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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 439

THE UNITED STATES OF AMERICA, APPELLANT

vs.

PHILIP KLEIN, ESCHEATOR OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED SEPTEMBER 30, 1937

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1 In Court of Common Pleas No. 5 of Philadelphia County

Relevant docket entries

Dec. 11, 1934, Petition for escheat of Moneys Deposited in and now in Custody of the Treasury of the United States filed.

Feb. 14, 1935, Motion to dismiss petition for want of jurisdiction.
Eo die, Reasons filed.

Feb. 21, 1935, Prayer of petition refused, R. E. L. J.

March 15, 1935, Rule to set aside order dismissing petition and for re-argument. All proceedings to stay meanwhile.
Eo die, Petition and affidavit filed.

July 18, 1935, Rule for re-argument is discharged.
Eo die, Opinion filed.

Sept. 26, 1935, Rule to show cause why Petition for escheat of moneys should not be amended. All proceedings to stay meanwhile.
Eo die, Petition filed.

Oct. 18, 1935, Rule absolute.

Dec. 7, 1935, Amended petition for escheat of moneys deposited in and now in custody of the Treasury of the United States filed.

Jan. 21, 1936, Motion to dismiss petition for escheat for want of jurisdiction filed.

Jan. 21, 1936, Motion granted. Opinion filed.
Eo die, Decree entered. Exception allowed petitioner.

3 Feb. 19, 1936, Certiorari from Supreme Court of January Term, 1936, No. 217, Appeal of Commonwealth of Penna., by Philip Klein, Escheator.

July 7, 1936, Record and remittance from Supreme Court of Jan. Term, 1936, No. 217 Appeal of Commonwealth of Penna., by Philip Klein, escheator, returned and filed. The order appealed from is reversed and the record is remitted for further proceedings.

Oct. 2, 1936 [Actually filed Oct. 1, 1936, at bar of court before hearing and entry of order of Oct. 1, 1936], Answer of the United States of America to amended petition for escheat of moneys deposited in and now in the custody of the Treasury of the United States of America filed.

Oct. 1, 1936, Decree escheat of the sum of $16,874.49 to the Commonwealth of Penna., and Philip Klein, Escheator, made and filed.

Oct. 6, 1936, Sten. notes filed.

Nov. 28, 1936, Petition for a rehearing and set aside order of Oct. 1, 1936.
Eo die, Petition filed.

Dec. 16, 1936, Rule absolute in so far as it applies to a rehearing.

Jan. 8, 1937, Decree entered by this Court on Oct. 1, 1936, is reaffirmed and decree of escheat in sum of $16,874.49 to Commonwealth of Penna., and Philip Klein, escheator, made and filed.

Feb. 3, 1937, Exceptions to decree of Court of Jan. 8, 1937, allowed and filed.

Feb. 5, 1937, Certiorari from Supreme Court as of Jan. Term, 1937, No. 164, Brought into office and filed. Appeal of U. S. America.

3a In Court of Common Pleas

Petition for escheat of moneys deposited in, and now in the custody of, the Treasury of the United States

To the Honorable, the Judges of the Said Court:

The petition of the Commonwealth of Pennsylvania by Philip Klein, Escheator, respectfully represents:

1. That on the 7th day of February 1934, Philip Klein was appointed Escheator of the Commonwealth of Pennsylvania by commission issued by Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, under the seal of the Department of Revenue. A true and correct copy of this commission is attached hereto, marked Exhibit A, and made part hereof.

2. That by the said commission full power and authority are granted to the said Philip Klein to act in behalf of the Commonwealth of Pennsylvania and to exercise all of the powers pertinent to the said appointment as Escheator, and to do and perform all of the duties required by law to be done for the purpose of procuring the Escheat to the Commonwealth of Pennsylvania of moneys deposited in the Treasury of the United States, and escheatable to the Commonwealth of Pennsylvania.

3. That the moneys sought to be escheated as hereinafter set forth arise out of the proceeding instituted in the United States District Court for the Eastern District of Pennsylvania by one Alice Frances Brown and others.

4 4. That on May 2nd, 1911, a proceeding was filed in the United States District Court for the Eastern District of Pennsylvania as of April Sessions, 1911, No. 677 under the caption of Alice Frances Brown et al. v. Pennsylvania Canal Company, Pennsylvania Railroad Company, et al.

5. That in the said proceeding a Bill of Complaint was filed by the plaintiff Alice Frances Brown setting forth that she was the owner of certain bonds issued by the Pennsylvania Canal Company, the said bonds being secured by a mortgage upon certain real estate of the Pennsylvania Canal Company; that she instituted this proceeding on behalf of herself and the owners of all the other bonds secured by the said mortgage; that the assets covered by the said mortgage had been improperly transferred to the Pennsylvania Railroad Company to the detriment of the bondholders; that the said assets were chargeable with the payment of the said bonds and that by reason of the conduct of the Pennsylvania Canal Company and the Pennsylvania Railroad Company, the latter company was bound to pay the principal of the said bonds; the Bill of Complaint provided for relief in the form of an order upon the Railroad Company to pay the said principal of the bonds to the owners thereof.

6. That in pursuance of the prayer of the said Bill of Complaint, a Decree was entered by the Honorable Oliver B. Dickinson, judge of the said District Court against the Pennsylvania Railroad Company and in favor of the bondholders for the full amount of the said bonds.

5 7. That by the terms of the said Decree it was provided that the bondholders should file their claims and that payment should then be made by the Pennsylvania Railroad Company.

8. That in pursuance of the said Decree most of the owners of the said bonds filed their claims, but a number of bondholders failed to file.

9. That a Master was appointed to determine the right to payment by virtue of the ownership of the said bonds and the Pennsylvania Railroad Company made payment to all claimants who filed.

10. That the owners of a number of bonds issued by the Pennsylvania Canal Company could not be located after extensive search and advertising in various periodicals.

11. That by reason of the fact that the owners of such bonds could not be found, the Court entered an order directing the payment of the moneys payable to the owners of such bonds into the Registry of the United States District Court for the Eastern District of Pennsylvania.

12. That further search was thereafter made to locate the owners of the said bonds and the effort was without result. That a petition was thereafter filed on behalf of those owners of the bonds who had filed their claims asking that the unclaimed moneys should be divided among them.

13. That the Court entered a decree denying the prayer of the said petition, setting forth that the moneys allotted to each bond were the property of the owner of such bond, and that the title thereto could not be divested in favor of the other bondholders or of the stockholders.

6 14. That after a lapse of five years, in accordance with the Act of Congress in such case made and provided (R. S. 851) the unclaimed moneys were paid into the Treasury of the United States in the name and to the credit of the United States.

15. That by section 852 of the revised statutes, it is further provided that any person or corporation or company entitled to such money may on petition to the court from which the money was received and upon full proof of right thereto, obtain an order of court directing the payment of such money to the claimant.

16. That the Act of General Assembly of the Commonwealth of Pennsylvania, approved April 17, 1869, P. L. 71, section 3 provides, "Whenever any trustee, bailee, or other depositary is or shall be possessed of property, real or personal, as a fiduciary agent, which property shall be without a rightful owner, the same shall escheat to the Commonwealth, subject to all legal demands on the same."

That the Act of the General Assembly, approved April 21st, 1921, P. L. 223 (Section 5) provides,

"After the owner, beneficial owner, or person entitled to any of the following named moneys or property shall be and remain unknown, or the whereabouts thereof shall have been unknown for the period of seven successive years, such money or property shall be escheatable to the Commonwealth * * * with interest actually accrued thereon to the date of the decree for the escheat
7 of the same, namely * * * '(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal Court in and for any District within the Commonwealth, or in the custody of any officer of any such court.'"

That the said Act of 1921 further provides: "After any moneys held by any person, bank, trust company, or corporation, or by any association, limited partnership or copartnership, belonging to any other person, the escheat of which is not otherwise provided for in this section, has been and remained unclaimed, by the person for whom the same is held, for the period of seven or more successive years, such moneys or property shall be escheatable to the Commonwealth."

17. That the decree of distribution in the said matter of Alice Frances Brown v. Penna. Canal Company was entered on October 4, 1917; that the said moneys were paid into the Registry of the Court on the 22nd day of January 1919.

18. That after the prayer for distribution of the unclaimed balance among the bondholders was denied, the said moneys were paid into the Treasury of the United States on the 30th day of June 1926.

19. That the said moneys have been unclaimed since the said date of decree of distribution on October 4th, 1917, and still remain unclaimed.

20. That by virtue of the provisions of the aforementioned Acts of Assembly of the Commonwealth of Pennsylvania the said moneys are escheatable to the Commonwealth of Pennsylvania.

8 21. That on April 17th, 1934, the Commonwealth of Pennsylvania, by Philip Klein, Escheator, filed his Petition in the United States District Court for the Eastern District of Pennsylvania, as of March Term, 1934, No. 8123, praying for the escheat of the moneys hereinabove described, the said petition praying that the said Court enter a finding that an escheat of the said moneys has occurred and praying further for an order directing the payment of the said moneys to the Commonwealth of Pennsylvania.

22. That due notice of the presentation of the said petition was given to the United States District Attorney for the Eastern District of Pennsylvania, and the said United States District Attorney filed an objection to the jurisdiction of the United States District Court.

23. That on September 6th, 1934, the Honorable Oliver B. Dickinson, Judge of the United States District Court filed an Opinion setting forth that the said Court has no jurisdicton to enter a Decree declaring escheat of the said moneys.

24. That on October 17th, 1934, the said Honorable Oliver B. Dickinson entered an order denying the prayer of the Commonwealth of Pennsylvania for the escheat of the said moneys, without prejudice.

25. That a decree of escheat is necessary in order to enable your Petitioner to proceed further in the United States District Court to recover the moneys to which the Commonwealth of Pennsylvania is entitled by virtue of the facts hereinbefore set forth.

Wherefore your petitioner prays that

1. That a day be set for a hearing upon this petition.

2. That a preliminary order be entered directing that service of a copy of this petition and notice of the day set for the hearing hereon be made upon Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania.

3. That after said hearing the Court shall enter a finding that an escheat has occurred of all the said unclaimed moneys except

(a) such moneys as shall appear at the said hearing to have been claimed by or paid to persons lawfully entitled thereto between the filing of this petition and the date of the said hearing:

(b) such moneys as may be claimed at the said hearing by persons lawfully entitled thereto.

4. That the said findings by the Court shall be accompanied by an order empowering and directing that the Treasurer of the United States pay the said moneys to Philip Klein, Escheator of the Commonwealth of Pennsylvania, for and on behalf of the Commonwealth of Pennsylvania upon the filing of a bond to the Commonwealth of Pennsylvania with sufficient security to be approved by your Honorable Court, conditioned for the faithful performance by the said Philip Klein of his duties as Escheator and for the faithful accounting and payment over to the State Treasury of the Commonwealth of Pennsylvania, through the Department of Revenue of the said Commonwealth, of the moneys so found to be escheated which come into your petitioner's possession as Escheator.

And your petitioner will ever pray, etc.

PHILIP KLEIN, *Petitioner.*

[*Duly sworn to by Philip Klein; jurat omitted in printing.*]

Exhibit A to petition

In the Name and by the Authority of the Commonwealth of Pennsylvania

Whereas, in and by an act of the General Assembly of said Commonwealth, approved on the second day of May, one thousand eight hundred and eighty-nine (P. L. Page 66), it is enacted "That whensoever by information or otherwise the Auditor General of the Commonwealth shall become aware of the fact that any property, real or personal, hath escheated or is supposed to have escheated to

11 the Commonwealth under the provisions of this act, he shal
appoint by commission, under his hand and the seal of hi
office, some suitable person, resident in the county where he shal
have reason to suppose that the escheated property or the greater par
thereof is situate, to act as Escheator of said property, which sai
Escheator shall have the powers and duties and shall be entitled to th
fees and rewards hereafter nominated and specified in this act"
and it is therein further enacted that the Escheator so appointe
when duly commissioned, shall apply by petition to the Court hav
ing Jurisdiction in the premises to hear and determine whether a
escheat has occurred or not, setting forth in his petition the fact o
his appointment and the nature and character of the alleged eschea
together with other facts and information required by said act.

And whereas, Section 205 of "The Fiscal Code" of 1929 provide
"The Department of Revenue shall exercise all of the powers, an
perform all of the duties heretofore exercised and performed by th
Auditor General, in the collection or recovery of property, both rea
or personal, which under the Laws of this Commonwealth, shall b
escheatable thereto for any reason"

"It may appoint escheators----------"

And whereas, also information has been given according to law
by Michael Edelman, Esq., of Philadelphia, Pennsylvania, that cer
tain moneys paid into and deposited in the United States Distric
Court for the Eastern District of Pennsylvania and now in th
Registry of the said court have escheated to the Commo
12 wealth, and that certain other moneys deposited in the Trea
ury of the United States have likewise escheated to th
Commonwealth.

Now, know all men by these presents, that I, Leon D. Metzge
Secretary of Revenue of the Commonwealth of Pennsylvania, b
virtue of the authority aforesaid, have appointed, and by these pre
ents do appoint, Philip Klein, Esquire, of 213 S. Broad Street, Phil
delphia, Penna., to be Escheator of said property, with full pow
and authority to act in the premises as the law directs, and to exe
cise all the powers appertaining to said appointment as Escheato
and to do and to perform all such duties as are required by law to b
done, in pursuance of the provisions of said act of May second, o
thousand eight hundred and eighty-nine, entitled "An act definin
and regulating escheats in cases where property is without a lawf
owner and providing for more convenient proceedings relative
the same," and said "The Fiscal Code."

Given under my hand and the seal of the Secretary of Reven
of Pennsylvania, this Seventh day of February, one thousand ni
hundred and thirty-four.

LEON D. METZGER,
Secretary of Revenue.

In Court of Common Pleas

Motion to dismiss for want of jurisdiction

And now, this 13th day of February 1935, the United States of America, by Charles D. McAvoy, Esq., United States Attor-
13 ney for the Eastern District of Pennsylvania appears specially and moves the Court to dismiss the above case for the following reasons:

(a) The Common Pleas Court of Philadelphia for the State of Pennsylvania has no jurisdiction to entertain the Petition above mentioned in that this Court cannot exercise jurisdiction as the state statutes are void insofar as they attempt to escheat moneys in the custody of the United States or in the custody of its Court.

(b) The funds sought to be escheated are in the Treasury of the United States as is alleged in the Petition and therefore are not within the jurisdiction of the Courts of Pennsylvania.

(c) The state law confers no jurisdiction upon any state court for the escheat of funds in the Treasury of the United States.

CHARLES D. McAVOY,
United States Attorney.

In Court of Common Pleas

Order of court sur petition

Feb. 21, 1935, Prayer of petition refused.

R. E. L., J.

In Court of Common Pleas

Opinion sur petition for escheat

Filed July 18, 1935

LAMBERTON, J.: Philip Klein, as Escheator of the Commonwealth of Pennsylvania, filed his Petition in which he averred that
14 on May 2, 1911, a proceeding was filed in the United States District Court for the Eastern District of Pennsylvania, as of April Sessions 1911, No. 677, under the caption of Alice Frances Brown, et al. v. Pennsylvania Canal Company, Pennsylvania Railroad Company, et al; that in said proceeding, a Bill of Complaint was filed asking that The Pennsylvania Railroad Company be required to pay the principal of certain bonds to the owners thereof; that an Order was duly made by Honorable Oliver B. Dickinson, Judge of said Court, in favor of the bondholders; that the owners of certain bonds could not be located, and the Court ordered the moneys payable to such bondholders to be paid into the Registry

of the United States District Court for the Eastern District of Pennsylvania, which was accordingly done on April 22, 1919; that the moneys remaining in the Registry of the Court were, on June 30, 1926, paid into the Treasury of the United States under the provisions of an Act of Congress providing as follows:

"In every case in which the right to withdraw money so deposited (in a depositary of the United States) has been adjudicated or is not in dispute, and such money has remained deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of the said Court, or its successor, to cause such money to be deposited in the Treasury of the United States in the name and to the credit of the United States. Any person or persons, or any corporation or company, entitled to such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States Attorney, and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant."

That said money still remains unclaimed, and is escheatable to the Commonwealth of Pennsylvania under the Acts of Assembly of said Commonwealth.

The Prayer of the Petition is (1) that a hearing be held and that the Court shall enter a finding that an escheat has occurred of said unclaimed moneys, except

"(a) such moneys as shall appear at the said hearing to have been claimed by or paid to persons lawfully entitled thereto between the filing of this petition and the date of the said hearing;

(b) such moneys as may be claimed at the said hearing by persons lawfully entitled thereto."

and (2) that this court shall make an Order empowering and directing that the Treasurer of the United States pay the said moneys to Philip Klein for and on behalf of the Commonwealth of Pennsylvania.

The United States Attorney for the Eastern District of Pennsylvania filed a Motion to dismiss. The matter came up for hearing, and on February 21, 1935, we entered an Order refusing the Prayer of the Petition. Subsequently, on the representation of counsel that additional legislation was pending at Harrisburg, we allowed a Rule for a reargument, which is the matter now before us. Counsel was apparently of the opinion that the Petition was discharged for purely procedural reasons, but this was not the case. The difficulty is fundamental. We might discuss the principle of escheat, procedure and sovereignty at great length, but this would serve no useful purpose. Our objections are definite and fundamental and can be very briefly stated.

In the first place, the money in question is in the Treasury of the United States. There is no Act of Assembly which provides for the escheat of such moneys to the Commonwealth of Pennsylvania.

In the second place, if such an Act were in existence, it would be

invalid. The right to take property by escheat is inherent in every sovereign, but is limited to property within the domain of that sovereign. Pennsylvania is a sovereign state, but so is the United States of America. When money is in the Treasury of the United States, it is within the domain of the United States of America and cannot be escheated to the Commonwealth of Pennsylvania.

In the third place, if this be regarded as an action to escheat moneys under the control of the United States District Court, any enabling legislation is void, because the United States District Court was created by an Act of Congress, and can be controlled only by Congress. The State of Pennsylvania is powerless to control or direct the actions of a District Court of the United States, even though that District Court be within the geographical bounds of the State of Pennsylvania.

For the above reasons, this Petition cannot prevail. It probably would have been better to have sustained the Motion to dismiss, rather than to have discharged the Petition, but the effect is the same.

And now, to wit, this 18th day of July 1935, the Rule for a reargument is discharged.

By the Court:

(Sgd.) LAMBERTON, *J.*

17 In Court of Common Pleas

Amended petition for escheat of moneys deposited in and now in the the custody of the Treasury of the United States

To the Honorable, the Judges of the said Court:

The petition of the Commonwealth of Pennsylvania by Philip Klein, Escheator, respectfully represents:

1. That on the 7th day of February 1934, Philip Klein was appointed Escheator of the Commonwealth of Pennsylvania by Commission issued by Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, under the seal of the Department of Revenue. A true and correct copy of this Commission is attached to the original petition filed in this case.

2. That by the said Commission full power and authority are granted to the said Philip Klein to act in behalf of the Commonwealth of Pennsylvania and to exercise all of the powers pertinent to the said appointment as Escheator, and to do and perform all of the duties required by law to be done for the purpose of procuring the Escheat to the Commonwealth of Pennsylvania of moneys deposited in the Treasury of the United States, and escheatable to the Commonwealth of Pennsylvania.

3. That the moneys sought to be escheated as hereinafter set forth arise out of the proceeding instituted in the United States
18 District Court for the eastern District of Pennsylvania by one Alice Frances Brown and others.

4. That on May 2nd, 1911 a proceeding was filed in the United States District Court for the Eastern District of Pennsylvania, as of April Sessions, 1911, No. 677 under the caption of Alice Frances Brown et al. v. Pennsylvania Canal Company, Pennsylvania Railroad Company, et al.

5. That in the said proceeding a Bill of Complaint was filed by the plaintiff Alice Frances Brown setting forth that she was the owner of certain bonds issued by the Pennsylvania Canal Company, the said bonds being secured by a mortgage upon certain real estate of the Pennsylvania Canal Company; that she instituted this proceeding on behalf of herself and the owners of all the other bonds secured by the said mortgage; that the assets covered by the said mortgage had been improperly transferred to the Pennsylvania Railroad Company to the detriment of the bondholders; that the said assets were chargeable with the payment of the said bonds and that by reason of the conduct of the Pennsylvania Canal Company and the Pennsylvania Railroad Company, the latter company was bound to pay the principal of said bonds; the Bill of Complaint provided for relief in the form of an order upon the Railroad Company to pay the said principal of the bonds to the owners thereof.

6. That in pursuance of the prayer of the said Bill of Complaint, a Decree was entered by the Honorable Oliver B. Dickson, Judge of the said District Court against the Pennsylvania Railroad Company and in favor of the bondholders for the full amount of the said bonds.

19 7. That by the terms of the said Decree it was provided that the bondholders should file their claims and that payment should then be made by the Pennsylvania Railroad Company.

8. That in pursuance of the said decree most of the owners of the said bonds filed their claims, but a number of bondholders failed to file.

9. That a Master was appointed to determine the right to payment by virtue of the ownership of the said bonds and the Pennsylvania Railroad Company made payment to all claimants who filed.

10. That the owners of a number of bonds issued by the Pennsylvania Canal Company could not be located after extensive search and advertising in various periodicals.

11. That by reason of the fact that the owners of such bonds could not be found, the Court entered an order directing the payment of the moneys payable to the owners of such bonds into the registry of the United States District Court for the Eastern District of Pennsylvania.

12. That further search was thereafter made to locate the owners of the said bonds and the effort was without result. That a petition was thereafter filed on behalf of those owners of the bonds who had filed their claims asking that the unclaimed moneys should be divided among them.

13. That the Court entered a decree denying the prayer of the said etition, setting forth that the moneys allotted to each bond were the property of the owner of such bonds, and that the title thereto could not be divested in favor of the other bondholders or of the stockholders.

14. That after a lapse of five years, in accordance with the Act Congress in such case made and provided (R. S. 851) the unaimed moneys were deposited in accordance with the provisions of ection 851 of the said Revised Statutes to the credit of the Treasry of the United States, such deposit being made by a bookkeeping ntry in the Federal Reserve Bank in the City of Philadelphia, ansferring the said moneys from the account of the Registry of the nited States District Court for the Eastern District of Pennsylania to the account of the Treasury of the United States.

15. That by Section 852 of the Revised Statutes, it is further proded that any person or corporation or company entitled to such oney may on petition to the court from which the money was ceived and upon full proof of right thereto, obtain an order of ourt directing the payment of such money to the claimant.

16. That the Act of General Assembly of the Commonwealth of ennsylvania, approved June 29th, 1935, states,

"Section II. Whenever any money, estate, or effects shall have een or shall hereafter be paid into or deposited in or be under the ontrol * * * of any court of the United States in and for any istrict within this Commonwealth, or shall be in the custody of any depositary, registry, or of any receiver, clerk, or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of ven years, the same shall escheat to the Commonwealth."

17. That the decree of distribution in the said matter of Alice rances Brown v. Penna. Canal Company was entered on October h, 1917; that the said moneys were paid into the Registry of the ourt on the 22nd day of January 1919.

18. That after the prayer for distribution of the unclaimed balance nong the bondholders was denied, the said moneys were deposited to e credit of the Treasury of the United States on June 30th, 1926.

19. That the said moneys have been unclaimed since the said date decree of distribution on October 4th, 1917, and still remain unaimed.

20. That by reason of the provisions of the aforesaid Act of Asmbly of the Commonwealth of Pennsylvania, the said moneys have cheated to the Commonwealth of Pennsylvania.

21. That on April 17th, 1933, the Commonwealth of Pennsylvania, Philip Klein, Escheator, filed his Petition in the United States strict Court for the Eastern District of Pennsylvania, as of March rm, 1934, No. 8123, praying for the escheat of the moneys hereinove described, the said petition praying that the said Court enter a

finding that an escheat of the said moneys has occurred and praying further for an order directing the payment of the said moneys to the Commonwealth of Pennsylvania.

22 22. That due notice of the presentation of the said petition was given to the United States District Attorney for the Eastern District of Pennsylvania, and the said United States District Attorney filed an objection to the jurisdiction of the United States District Court.

23. That on September 8th, 1934, the Honorable Oliver B. Dickinson, Judge of the United States District Court filed an Opinion setting forth that the said Court has no jurisdiction to enter a Decree declaring escheat of the said moneys.

24. That on October 17th, 1934, the said Honorable Oliver B. Dickinson entered an order denying the prayer of the Commonwealth of Pennsylvania for the escheat of the said moneys, without prejudice.

25. That a decree of escheat is necessary in order to enable your Petitioner to proceed further in the United States District Court to recover the moneys to which the Commonwealth of Pennsylvania is entitled by virtue of the facts hereinbefore set forth.

26. That the aforementioned Act of June 29th, 1935, provides further—

"Section V. Whenever as escheat has occurred or shall occur of any money or property deposited in the custody of or under the control of any Court of the United States in and for any District within this Commonwealth, or in the custody of any depositary, clerk, or other officer of such court, the court of common pleas of the county in which such court of the United States sits shall have juris-

23 diction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of this Commonwealth."

Wherefore your petitioner prays that

1. That a day be set for a hearing upon this petition.

2. That a preliminary order be entered directing that service of a copy of this petition and notice of the day set for the hearing hereon be made upon Charles D. McAvoy, United States Attorney for the Eastern District of Pennsylvania.

3. That after said hearing the Court shall enter a finding that an escheat has occurred of all of the said unclaimed moneys except

(a) such moneys as shall appear at the said hearing to have been claimed by or paid to persons lawfully entitled thereto between the filing of this petition and the date of the said hearing;

(b) such moneys as may be claimed at the said hearing by persons lawfully entitled thereto.

And your petitioner will ever pray, etc.

PHILIP KLEIN, *Petitioner.*

[Duly sworn to by Philip Klein; jurat omitted in printing.]

24 In Court of Common Pleas

Motion to dismiss for want of jurisdiction

And now, this 31st day of December 1935, the United States of America, by Charles D. McAvoy, Esq., United States Attorney for the Eastern District of Pennsylvania appears specially and moves the Court to dismiss the above case for the following reasons:

(a) The Common Pleas Court of Philadelphia for the State of Pennsylvania has no jurisdiction to entertain the Petition above mentioned in that this Court cannot exercise jurisdiction as the state statutes are void insofar as they attempt to escheat moneys in the custody of the United States or in the custody of its court.

(b) The funds sought to be escheated are in the Treasury of the United States as is alleged in the Petition and therefore are not within the jurisdiction of the Courts of Pennsylvania.

(c) The state law confers no jurisdiction upon any state court for the escheat of funds in the Treasury of the United States.

CHARLES D. McAVOY,
United States Attorney.

25 In Court of Common Pleas

Opinion sur motion to dismiss

ALESSANDRONI, J.: This matter has been previously before us, and was disposed of in an opinion by Lamberton, J., filed July 18, 1935. In that opinion the facts were fully stated and need not here be repeated. Subsequently, on the representation of counsel for the Petitioner that new facts had been discovered, leave was granted to file an Amended Petition, and this was accordingly done. The United States Attorney has again filed a Motion to Dismiss.

The original Petition for escheat recited that the moneys had been "deposited in the custody of the Treasury of the United States." The Amended Petition repeats this averment, but amplifies it by stating "such deposit being made by a bookkeeping entry in the Federal Reserve Bank in the City of Philadelphia, transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania to the account of the Treasury of the United States." This is the only change of any substance made by the Amended Petition.

We do not believe the Amended Petition improves the position of the Petitioner. It avers that the transfer of the money was by a bookkeeping entry. In these days of banking facilities, it is seldom that a transfer is made in any other way, and a transfer so made is just as complete and effectual as if gold coin (there being such in the year when this transfer was made) were bodily shipped from
26 one place to another. Therefore, the three reasons given in the opinion of Judge Lamberton still preclude petitioner from

maintaining this action. Even if transfer by bookkeeping entry be considered no transfer at all, which is unthinkable, the third reason given by Judge Lamberton would still present an insuperable barrier to the maintenance of this action.

And now, to wit, this 21st day of January, 1936, the Motion of Charles D. McAvoy, United States Attorney, to dismiss the Petition in the above case is granted.

By the Court:

(Sgd.) ALESSANDRONI, *J.*

In Court of Common Pleas

Order of court sur amended petition

And now, to wit, this 21st day of January, 1936, the Motion of Charles D. McAvoy, United States Attorney, to dismiss the Petition in the above case is granted.

By the Court:

(Sgd.) ALESSANDRONI, *J.*

In Court of Common Pleas

Final decree

(For Purpose of First Appeal)

And now, to wit, this 21st day of January A. D. 1936, this cause having come on before the Court for hearing on Petition, Amended Petition and Motion to Dismiss,

27 It is Ordered and Decreed: That the Motion to Dismiss is hereby sustained and that the Petition as Amended be and the same is hereby Dismissed.

Exception allowed to the Petitioner.

By the Court:

(Sgd.) ALESSANDRONI, *J.*

In Supreme Court of Pennsylvania

Opinion

Filed June 26, 1936

(Reported in 322 Pa. 481)

LINN, J.: The Commonwealth, by Klein, its escheator, filed this petition averring that in certain equity proceedings in the District Court of the United States for the Eastern District of Pennsylvania, (At April Sessions, 1911, No. 677, Alice Frances Brown et al. v. Pennsylvania Canal Company and others. See also Rea v. Pennsylvania Canal Company, 245 Pa. 589, 91 A. 1053) certain sums

were found to be due and payable to described bondholders; that some creditors, so sound to be entitled, had not claimed payment, whereupon the court directed that such unclaimed funds be paid into its registry; that after the lapse of five years (in accordance with the Act of May 29, 1920, C. 214, Section 1, 41 Stat. 654, 28 USCA section 851) the unclaimed moneys were deposited to the credit of the Treasury of the United States. The petition averred that "such deposit (was) made by a bookkeeping entry in the Fed-
28 eral Reserve Bank in the City of Philadelphia, transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania to the account of the Treasury of the United States." The petition also set forth that the Act of Congress (Act of March 3, 1911, C. 224, 36 Stat. 1088, 28 USCA section 852) provided "Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders."

The Commonwealth averred that the unclaimed money escheated to it; that in April 17, 1934, a petition on its behalf was filed in the District Court (to March Term, 1934, No. 8123) for an order directing payment, as an escheat, to the Commonwealth; and that on September 6, 1934, an opinion was filed by Dickinson, J., dismissing the petition for want of jurisdiction and without prejudice.

Petitioner averred that a decree of escheat was necessary to qualify its escheator under the decision of the District Court and the Act of Congress to present, in that Court, the claim of the Commonwealth as the person entitled to the escheat.

Notice of the petition was given to the United States Attorney for the Eastern District of Pennsylvania; he appeared specially and moved to dismiss for want of jurisdiction, assigning the following reasons:

29. "(a) The Common Pleas Court of Philadelphia for the State of Pennsylvania has no jurisdiction to entertain the Petition above mentioned in that this court cannot exercise jurisdiction as the state statutes are void insofar as they attempt to escheat moneys in the custody of the United States or in the Custody of its court.

"(b) The funds sought to be escheated are in the Treasury of the United States as is alleged in the Petition and therefore are not within the jurisdiction of the Courts of Pennsylvania.

"(c) The state law confers no jurisdiction upon any state court for the escheat of funds in the Treasury of the United States."

The petition was dismissed and the Commonwealth has appealed.

The Act of May 2, 1889, P. L. 66, and amendments and supplements

provide for escheat proceedings. In this case the Commonwealth depends on the following amendment of June 28, 1935, P. L. 472: "Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk, or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth."

30 We all agree that the learned court erred in dismissing the petition for want of jurisdiction. The power to declare an escheat is in the Commonwealth. It is a power that was not delegated to the federal government, though its exercise by a State may be restricted in the fields where the power of Congress is exclusive; cf. First National Bank v. State of California, 262 U. S. 366. "The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the State": Cunnius v. Reading School District, 206 Pa. 469; 50 A. 16. The property under discussion is a debt payable by a debtor who deposited the money for distribution pursuant to a decree in an equity proceeding pending in the District Court. The money is still held under its control, pursuant to the Act of Congress, for the purpose for which it was paid. "That the debt due the absentee by the School District resulting from the establishment of her dower was within the jurisdiction of the state authority is clear": Cunnius v. Reading School District, 198 U. S. 458, 467. As the Commonwealth merely asks for a declaration of escheat and does not desire an order of payment directed to any federal agency there would seem to be no objection to considering the proceedings as in personam: cf. Security Bank v. California, 263 U. S. 282, 287.

The United States Attorney does not claim that the property has escheated to the federal government or that the federal government can escheat it. His contention is that the State has no power "to escheat moneys presently in the Treasury of the United States." It is well settled that the State has power to take possession of unclaimed property as an escheat. Security Savings Bank v. Cal-

31 ifornia, 263 U. S. 282, supra; Com. v. Dollar Savings Bank, 259 Pa. 138; 102 A. 569; Germantown Trust Co. v. Powell, 265 Pa. 71; 108 A. 441. It may be conceded that the State cannot take possession of property in the custody of the federal government, but that fact need not prevent the judicial determination by the State of the succession to unclaimed property within its borders. The argument made for the Commonwealth concedes that the State court can make no order on the federal treasury or on any other representative of the federal government, requiring the delivery of the property to the escheater; but the contention is that as the District Court, in the proceeding brought by the escheater and referred to above, held

hat the court lacked power to declare an escheat (The learned district judge said: "The act of congress which makes these moneys ubject to the award of this Court does so only in favor of 'any erson or persons, corporation or company' who can lay successful laim of ownership thereto. Assuming arguendo the state to be vithin this Act it is able as yet to show no title to these moneys. Jnder the facts it may or may not be able to secure a judgment to escheat but it has not done so. Counsel for petitioner recognize this nd hence ask this court to enter such a judgment. Have we the urisdictional power to so do? * * * The real position of the etitioner is that the State Statutes have conferred jurisdicion upon o State Court to enter Judgment to escheat these moneys but they ave conferred it upon this court. This they cannot do, and we in onsequence have no such power. * * * The State has no title nd no title by escheat can be acquired otherwise than by a compliance with these statutes. When the petitioner is able to show title to these moneys it will then be our duty to pass judgment upon the title set up.") and dismissed his petition without prejudice, this proceeding in the State Court was necessarily nstituted to determine the fact of escheat, and, the fact being found, o enable the Commonwealth then to present its claim to the District Court in control of the fund pursuant to the Act of Congress. In the ircumstances, therefore, we think the court should have proceeded vith the case and should have made such determination as the evience may require, and if an escheat were found, to have restricted he enforcement of its order to the proper presentation of the Commonwealth's claim in the District Court to enable that court to etermine whether payment should be made to the Commonwealth. uch an order would seem to be within the following language of the hief Justice in United States v. Bank of New York and Trust Company, 296 U. S. 463: "This principle is applied in the discharge of the ong recognized duty of this court to give effect to such 'methods of rocedure as shall serve to conciliate the distinct and independent ribunals of the States and of the Union, so that they may cooperate s harmonious members of a judicial system coextensive with the nited States.' Taylor v. Carryl, 20 How. 583, 595." See, too, Territory of Alaska v. First Nat. Bank, 22 F. (2d) 377; same v. same, 1 F. (2d) 186.

The order apepal from is reversed and the record is remitted or further proceedings.

he Supreme Court of Pennsylvania,
Eastern District, City and County of Philadelphia, ss.

The Commonwealth of Pennsylvania

o the Judges of the Court of Common Pleas No. 5, County of Philadelphia. Greeting:

Whereas, By virtue of our Writ of Certiorari from our Supreme ourt of Pennsylvania for the Eastern District, returnable in the

same Court on the third Monday of April in the year of our Lord one thousand nine hundred and thirty-six, a record was brought into the same Court upon appeal by Commonwealth of Pennsylvania by Philip Klein, Escheator, from your . . . decree . . . made in the matter of . . . No. 1820 December Term, 1934. In the matter of: Escheat of Moneys in Custody of United States Treasury . . . And it was so proceeded in our said Supreme Court, that the following judgment was made, to wit;

The order appealed from is reversed and the record is remitted for further proceedings, . . . And the record proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the Act of the General Assembly in such case made and provided) ordered by the said Supreme Court to be remitted to the . . . Court . . . Common Pleas No. 5 . . . for the County of . . . Philadelphia . . . aforesaid, as well for execution or otherwise as to justice shall appertain. Wherefore we here remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness, the Honorable John W. Kephart, Doctor of Laws, Chief Justice of our said Supreme Court, at Philadelphia, the . . . 6th . . . day of . . . July in the year of our Lord one thousand nine hundred and thirty.

EDNA W. MIXSELL,
Deputy Prothonotary.

34 In Court of Common Pleas

Answer of the United States of America to amended petition for escheat of moneys deposited in and now in the custody of the Treasury of the United States of America

The United States of America, by Charles D. McAvoy, Esq., United States Attorney for the Eastern District of Pennsylvania, makes answer to the Amended Petition of the Commonwealth of Pennsylvania, by Philip Klein, Escheator, as follows:

1. The allegations set forth in paragraph one of the complainant's petition are admitted.

2. For answer to the allegations contained in paragraph two of the complainant's petition, it is admitted that the said commission issued by Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, gives full authority to the said Philip Klein, Escheator, to exercise all powers pertinent to his appointment; it is denied, as alleged in said commission, which is made a part of the complainant's petition, that certain moneys now in the registry of the court and other moneys deposited in the Treasury of the United States, have escheated to the Commonwealth of Pennsylvania.

3. The allegations set forth in paragraph three of the complainant's petition are admitted.

4. The allegations set forth in paragraph four of the complainant's petition are admitted.

35 5. The allegations set forth in paragraph five of the complainant's petition are admitted.

6. The allegations set forth in paragraph six of the complainant's petition are admitted.

7. The allegations set forth in paragraph seven of the complainant's petition are admitted.

8. The allegations set forth in paragraph eight of the complainant's petition are admitted.

9. The allegations set forth in paragraph nine of the complainant's petition are admitted.

10. The allegations set forth in paragraph ten of the complainant's petition are admitted.

11. The allegations set forth in paragraph eleven of the complainant's petition are admitted.

12. It is denied that search was made to locate the owners of said bonds and the effort was without result, in that as late as December 10, 1935, Sophy Jane Russell, under an appropriate Decree by Judge Oliver B. Dickinson of the United States District Court for the Eastern District of Pennsylvania, was awarded the sum of $1,794.20 as a person entitled to the proceeds of said bonds. Further, it is admitted that a petition was filed on behalf of the bondholders who had filed their claims, asking for a division of the unallocated moneys amongst them.

13. The allegations set forth in paragraph thirteen of the complainant's petition are admitted.

14. For answer to the allegation contained in paragraph fourteen of the complainant's petition, it is admitted that the unclaimed

36 moneys were deposited in the Treasury of the United States, but it is denied that said deposit was made by a bookkeeping entry in the Federal Reserve Bank of Philadelphia transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania, to the account of the Treasury of the United States; on the contrary, it is averred that said deposit in the Treasury of the United States was full and complete and made in accordance with the practice and custom of the Treasury Department and that the Treasury of the United States has full and complete control of said funds.

15. The allegations set forth in paragraph fifteen of the complainant's petition are admitted.

16. The allegations set forth in paragraph sixteen of the complainant's petition are admitted.

17. The allegations set forth in paragraph seventeen of the complainant's petition are admitted.

18. The allegations set forth in paragraph eighteen of the complainant's petition are admitted.

19. The allegation contained in paragraph nineteen of complainant's petition is denied and for further answer it is averred that as

recent as December 10th, 1935, Judge Oliver B. Dickinson of the United States District Court for the Eastern District of Pennsylvania by appropriate decree, awarded $1,794.20 to Sophy Jane Russell as a person entitled to share in this fund.

20. The allegation contained in paragraph twenty of the
37 complainant's petition is denied and for further answer it is averred that the Court of Common Pleas of Philadelphia County has neither the right nor the power to declare and escheat of these funds in the Treasury of the United States, and any statute of the Commonwealth of Pennsylvania attempting to so empower the said Court of Common Pleas of Philadelphia County so to do, is unconstitutional, as being an unlawful interference with the Federal Government, as well as an attempted exercise of sovereignty outside the jurisdiction of the said Commonwealth.

21. The allegations set forth in paragraph twenty-one of the complainant's petition are admitted.

22. The allegations set forth in paragraph twenty-two of the complainant's petition are admitted.

23. The allegations set forth in paragraph twenty-three of the complainant's petition are admitted.

24. The allegations set forth in paragraph twenty-four of the complainant's petition are admitted.

25. The allegation contained in paragraph twenty-five of complainant's petition is denied, in that the right to take property by escheat by any sovereign, is limited to the property within the domain of that sovereign, and when money is in the Treasury of the United States it is within the domain of the United States of America and cannot be escheated to the Commonwealth of Pennsylvania.

38 26. The allegation contained in paragraph twenty-six of the complainant's petition, wherein Section 5 of the Act of June 29th, 1935, is set forth, is admitted, but it is averred that said Act of the Commonwealth of Pennsylvania is unconstitutional, as being an unlawful interference with the Federal Courts and is an attempt by the Commonwealth of Pennsylvania to arrogate to itself jurisdiction over a matter outside and beyond its lawful jurisdiction.

(Sgd.) CHARLES D. McAVOY,
United States Attorney.

[*Duly sworn to by Charles D. McAvoy; jurat omitted in printing.*]

39 In Court of Common Pleas No. 5 of Philadelphia County

Statement of evidence

Before Hon. FRANK SMITH, P. J.

Present: Grover C. Ladner, Esq., For the Escheator, Commonwealth of Penna. Edward A. Kallick, Esq., Asst. United States District Attorney, For the United States Government. Theodore Voorhees, Esq., For the Pennsylvania Railroad Co.

Offers in evidence

Mr. LADNER. I desire to offer in evidence the following admissions as taken from the Answer of the United States to the Amendment Escheat Petition:

Paragraph No. 2—That portion of Paragraph No. 2, the Answer to which reads as follows: "For answer to the allegations contained in Paragraph No. 2 of the complainant's petition, it is admitted that the said Commission issued by Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania, gives full authority to the said Philip Klein, Escheator, to exercise all powers pertinent to his appointment."

Paragraph No. 3 of the Petition—the Amended Petition, as admitted in full: "3. That the moneys sought to be escheated as hereinafter set forth arise out of the proceeding instituted in the
40 United States District Court for the Eastern District of Pennsylvania by one Alice Frances Brown and others."

Paragraph No. 4 of the Amended Petition for Escheat as admitted in full: "4. That on May 2nd, 1911, a proceeding was filed in the United States District Court for the Eastern District of Pennsylvania as of April Sessions, 1911, No. 677 under the caption of Alice Frances Brown et al. v. Pennsylvania Canal Company, Pennsylvania Railroad Company, et al."

Paragraphs Nos. 5, 6, 7, 8, 9, 10, and 11 of the Amended Petition are all admitted in full by the Answer and are offered in evidence, as follows:

"5. That in the said proceeding a Bill of Complaint was filed by the plaintiff Alice Frances Brown setting forth that she was the owner of certain bonds issued by the Pennsylvania Canal Company, the said bonds being secured by a mortgage upon certain real estate of the Pennsylvania Canal Company; that she instituted this proceeding on behalf of herself and the owners of all the other bonds secured by the said mortgage; that the assets covered by the said mortgage had been improperly transferred to the Pennsylvania Railroad Company to the detriment of the bondholders; that the said assets were chargeable with the payment of the said bonds and that by reason of the conduct of the Pennsylvania Canal Company and the Pennsylvania Railroad Company, the latter company was bound to pay the principal of the said bonds; the Bill of Complaint provided for relief in the form of an order upon the Railroad Company to pay the said principal of the bonds to the owners thereof."

41 "6. That in pursuance of the prayer of the said Bill of Complaint, a Decree was entered by the Honorable Oliver B. Dickinson, Judge of said District Court against the Pennsylvania Railroad Company and in favor of the bondholders for the full amount of the said bonds."

"7. That by the terms of the said Decree it was provided that the bondholders should file their claims and that payment should then be made by the Pennsylvania Railroad Company."

"8. That in pursuance of the said Decree most of the owners of the said bonds filed their claims, but a number of bondholders failed to file."

"9. That a Master was appointed to determine the right to payment by virtue of the ownership of the said bonds and the Pennsylvania Railroad Company made payment to all claimants who filed."

"10. That the owners of a number of bonds issued by the Pennsylvania Canal Company could not be located after extensive search and advertising in various periodicals."

"11. That by reason of the fact that the owners of such bonds could not be found, the Court entered an order directing the payment of the moneys payable to the owners of such bonds into the Registry of the United States District Court for the Eastern District of Pennsylvania."

The following admission contained in Paragraph No. 12 of
42 the Answer is offered, which reads: "Further it is admitted that a petition was filed on behalf of the bondholders who had filed their claims asking for a division of the unallocated moneys amongst them."

Paragraph No. 13 of the amended Petition is offered in evidence, and is admitted in full: "13. That the Court entered a decree denying the prayer of the said petition, setting forth that the moneys allotted to each bond were the property of the owner of such bonds, and that the title thereto could not be divested in favor of the other bondholders or of the stockholders."

The following portion of Paragraph No. 14 of the amended Petition is offered in evidence, and is admitted in the corresponding paragraph of the Answer: "14. That after a lapse of five years, in accordance with the Act of Congress in such case made and provided (R. S. 51) the unclaimed moneys were deposited in accordance with the provisions of Section 851 of the said Revised Statutes to the credit of the Treasury of the United States."

The whole of Paragraph No. 15 of the amended Petition is offered in evidence, the same being admitted in the Answer; as is also Paragraph No. 16 of the amended Petition; also Paragraph No. 17 and Paragraph No. 18, as follows:

"15. That by Section 852 of the Revised Statutes, it is further provided that any person or corporation or company entitled to such money may on petition to the court from which the money was received and upon full proof of right thereto, obtain an order of court directing the payment of such money to the claimant."

43 ("16. That the Act of General Assembly of the Commonwealth of Pennsylvania, approved June 29th, 1935, states, 'Section II. Whenever any money, estate, or effects shall have been or shall hereafter be paid into or deposited in or be under the control . . . of any court of the United States in and for any District within this Commonwealth, or shall be in the custody of any depositary, registry or of any receiver, clerk or other officer of any of said courts,

and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth.'"

"17. That the decree of distribution in the said matter of Alice Frances Brown v. Penna. Canal Company was entered on October 4th, 1917; that the said moneys were paid into the Registry of the Court on the 22nd day of January, 1919."

"18. That after the prayer for distribution of the unclaimed balance among the bondholders was denied, the said moneys were deposited to the credit of the Treasury of the United States on June 30th, 1926."

Paragraph No. 19 of the amended Petition is offered in evidence, because Paragraph No. 19 of the Answer is not responsive: "19. That the said moneys have been unclaimed since the said date of decree of distribution on October 4th, 1917, and still remain unclaimed."

Paragraph No. 21 of the amended Petition is offered in evidence in full, being admitted by the Answer, as is also Paragraphs Nos. 22, 23, and 24:

44 "21. That on April 17th, 1934, the Commonwealth of Pennsylvania, by Philip Klein, Escheator, filed his Petition in the United States District Court for the Eastern District of Pennsylvania, as of March Term, 1934, No. 8123, praying for the escheat of the moneys hereinabove described, the said petition praying that the said Court enter a finding that an escheat of the said moneys has occurred and praying further for an order directing the payment of the said moneys to the Commonwealth of Pennsylvania."

"22. That due notice of the presentation of the said petition was given to the United States District Attorney for the Eastern District of Pennsylvania, and the said United States District Attorney filed an objection to the jurisdiction of the United States District Court."

"23. That on September 6th, 1934, the Honorable Oliver B. Dickinson, Judge of the United States District Court filed an Opinion setting forth that the said Court has no jurisdiction to enter a Decree declaring escheat of the said moneys."

"24. That on October 17th, 1934, the said Honorable Oliver B. Dickinson entered an order denying the prayer of the Commonwealth of Pennsylvania for the escheat of the said moneys, without prejudice."

Paragraph No. 25 of the amended Petition is offered in evidence because of the insufficient denial of the corresponding paragraph of the Answer: "25. That a decree of escheat is necessary in

45 order to enable your Petitioner to proceed further in the United States District Court to recover the moneys to which the Commonwealth of Pennsylvania is entitled by virtue of the facts hereinbefore set forth."

Paragraph No. 26 is offered in evidence, being admitted to be the correct statement of the Statute Law of the State of Pennsylvania,

although the Government of the United States avers that it is unconsitutional—that having been already adversely ruled upon by the Supreme Court.

"26. That the aforementioned Act of June 29th, 1935, provides further: 'Section V. Whenever an escheat has occurred or shall occur of any money or property deposited in the custody of or under the control of any Court of the United States in and for any District within this Commonwealth, or in the custody of any depositary, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of this Commonwealth."

I have subpoenaed the record of the United States District Court—the entire record; but the only relevant part is the part which I will call attention to—that is the Bill of Complaint filed in the case of Alice Frances Brown et al. v. Pennsylvania Canal Company, Samuel Rea, Pennsylvania Railroad Company, et al. In the District Court of the United States for the Eastern District of Pennsylvania, No. 677, April Session, 1911; the Decree that was filed pursuant to
46 that Bill on April 6th, 1916; the Mandate of the United States Circuit Court of Appeals affirming the Decree of the United States District Court in the Appeal of the Pennsylvania Canal Company, which is dated January 13th, 1917; the Decree of Distribution which was filed and dated October 4th, 1917; the Decree directing the Trustee to make certain payments and to deposit the balance of the money in the Registry of the Court which is dated December 19th, 1918; the Decree of August 17th, 1921, denying the Petition for Distribution of the balance of the fund in the Registry of the Court and refusing to confirm the Trustees' report, and allowing exceptions to the Petition as filed; the Mandate of the United States Circuit Court of Appeals affirming the said Decree of the United States District Court, dated March 28th, 1922.

I also offer in evidence the proof of publication in compliance with the decree of this Court notifying everybody of the application. That is already filed among the papers.

We think that completes the case.

Mr. Kallick. There is no objection to the offer.

Mr. Ladner. Before closing I will have the United States Clerk testify as to the exact balance on hand and unclaimed today.

W. H. Spann, being duly sworn according to law, was examined and testified as follows:

By Mr. Ladner:

Q. Your position is what?

A. Deputy Clerk, United States District Court.

47 Q. Are you able to tell us from the records of the United States District Court the amount of the unclaimed funds which are under the control of the Court, and which remain from

the amount originally deposited in the Registry in the Court, in the case of Alice Frances Brown et al. vs. Pennsylvania Canal Company, et al. No. 677 in Equity, April Sessions 1911?

A. On June 26th, 1926, there was paid into the Treasury of the United States the balance in the Registry of the Court, amounting to $18,650.75. Some time later, on March 30, 1936, there was a decree allowing payment to Sophie Jane Russell of $1,776.26, and I believe the balance in the Treasury is $16,874.49.

Q. That leaves how much?

A. $16,874.49.

Q. What is the date on the Petition of Sophie Jane Russell?

A. March 30th, 1936.

Q. That is when the petition was filed?

A. Yes.

Q. It was paid at what time?

A. Order to pay it was entered on the same date.

Q. The same date?

A. March 30th, 1936.

Q. Since that time there has been on further application by anybody for this money?

A. No, sir.

Q. That is by the owners?

A. No, sir.

Testimony closed.

48 Mr. VOORHEES. I represent the Pennsylvania Railroad Company, which is a claimant for this fund and we have filed a petition in the United States District Court for the payment of that fund to us.

The COURT. You are opposed to the escheat?

Mr. VOORHEES. We are opposed to the escheat and our petition will be heard on Monday, October 5th. We are not coming into this Court presenting our claim at this time because we have already submitted our claim to the Court which we recognize as having jurisdiction; but in order that this Court may know that the Federal Court is considering our petition we wanted to let you know so if you care to you will await the decision of the Federal Court before declaring the escheat here, because if the Federal Court is going to decide that we are the owners of the fund it probably would not recognize the decree of this Court escheating it in any case.

Mr. LADNER. The Pennsylvania Railroad Company filed a petition in the Supreme Court; they were heard at the argument and the Supreme Court says that this Court has jurisdiction to enter the decree. The effect and validity of that decree, whether it will operate to actually collect the money from the United States is an entirely different question, with which they say neither this Court nor any other State Court is concerned—that is a question for the Federal Court.

Mr. LADNER: So far as the original record of the United States District Court is concerned the Clerk is taking with him the original documents, and has left a certified copy of all the matters I have called attention to, with the exception of the Bill in Equity. I do not think the Bill itself is material so long as we have the decrees and the orders of the Court. These copies are certified and he asked if the stenographer would be permitted to copy from the certified copy instead of the originals, so that the originals might not pass out of his possession.

The COURT. Yes, that will be all right.

Offers in evidence

In the District Court of the United States for the Eastern District of Pennsylvania

ALICE FRANCES BROWN, ESTHER J. HASBROUCK, ALLISON W. JACKSON AND FRANK HASBROUCK, EXECUTORS OF THE LAST WILL AND TESTAMENT OF SERAPHINE R. JACKSON, DEC'D, AND ALLISON W. JACKSON, JAY COOKE, 3RD, EDWARD BAILEY AND JOHN CADWALADER

vs.

PENNSYLVANIA CANAL COMPANY, SAMUEL REA, PENNSYLVANIA RAILROAD COMPANY, PHILADELPHIA & READING RAILWAY COMPANY, NORTHERN CENTRAL RAILWAY COMPANY, NORTHERN CENTRAL CONNECTING RAILROAD CO. AND HARRISBURG, PORTSMOUTH, MT. JOY & LANCASTER RAILROAD COMPANY.

No. 677. April Sess., 1911

DOCKET ENTRIES

1935

Dec. 10. Petition by Sophy Jane Russell for payment from Treasury of U. S. on account of certain bonds and Decree granting prayer of petition filed.

Dec. 14. Appearance of Cravath DeGersdorff, Swaine & Wood for Sophy Jane Russell, petitioner, filed.

1936

Mar. 30. Amended Decree to pay from U. S. Treasury certain claim filed (S. J. Russell).

July 31. Petition by Pennsylvania Railroad Company for Order directing payment to petitioner of money deposited in Treasury of United States filed.

Sept. 23. Petition of Commonwealth of Penna. for leave to intervene and Order of Court granting leave to file petition filed.

Sept. 24. Answer of United States to petition of Penna. Railroad Co. filed.

51 In the District Court of the United States for the Eastern District of Pennsylvania

ALICE FRANCES BROWN (PLAINTIFF) AND JAY COOKE, 3RD, EDWARD BAILEY AND JOHN CADWALADER (INTERVENING PLAINTIFFS)

vs.

PENNSYLVANIA CANAL COMPANY AND PENNSYLVANIA RAILROAD COMPANY (DEFENDANTS)

In Equity. April Sessions, 1911. No. 677

Decree

Filed Dec. 19, 1918

Before DICKINSON, *J.*

And now, to-wit: this 19th day of December 1918, it having been represented to the Court by supplemental report of David Wellerstein, Esq., Master, filed this day, that fifty-nine bonds of the Pennsylvania Canal Company, referred to in the decree of this Court dated November 14th, 1918, have not been presented to him and no information has been received as to their ownership and that five other of said bonds have been presented to him, but that formal proof of their ownership cannot be made until later, it is ordered, adjudged, and decreed as follows:

52 1. The order of the Court directing Samuel Rea, Trustee, to apply the balance of the fund remaining in his hands, after the payment of certain costs and charges as set forth in said decree of November 14th, 1918, to the payment of the principal of the said bonds of the Pennsylvania Canal Company, so far as the same shall have been proven before the Master, is hereby rescinded; and the said Samuel Rea, Trustee, is now ordered and directed to pay out of the said balance remaining in his hands (after providing for the payment of any additional expenses for advertising or other costs incurred by the Master) the sums which would be due to the holders of bonds who have presented the same to the Master and according to a schedule which the Master shall furnish him, in accordance with the said decree and this supplemental decree, as if the entire 1948 bonds outstanding had been proven so that each bondholder mentioned in said schedule will receive the amount he would have received had the entire number of said 1948 outstanding bonds been proven and had participated in the distribution.

2. The balance of the said fund remaining in his hands after making the payments aforesaid, the said Samuel Rea, Trustee, shall pay into this Court to be held subject to the further order of the Court, and thereafter the said Samuel Rea, Trustee, may file a report setting forth the above facts and praying for his discharge as the said Trustee.

3. The Master is ordered and directed to make such further advertisement and efforts to ascertain the location of the bonds
53 not yet proven as he may in his discretion determine and to make a further report to the Court not later than six months from this date. Except as modified by this supplemental decree the said decree of this Court of November 14th, 1918, is in all respects confirmed.

By the Court.

Attest:

(s) GEORGE BRODBECK, *Clerk.*

In the District Court of the United States for the Eastern District of Pennsylvania

ALICE FRANCES BROWN (PLAINTIFF) AND JAY COOKE, 3RD, EDWARD BAILEY AND JOHN CADWALADER (INTERVENING PLAINTIFFS)

v.

PENNSYLVANIA CANAL COMPANY AND PENNSYLVANIA RAILROAD COMPANY (DEFENDANTS)

In Equity. April Sessions, 1911. No. 677

Decree

And now, to-wit: this 17th day of August 1921, upon consideration of the petition of Alice Frances Brown, Jay Cooke, 3rd, Edward Bailey and John Cadwalader for the distribution of the balance of the fund remaining in the Registry of the Court to petitioners and other holders of 1916 bonds of the Pennsylvania Canal Com-
54 pany who have proved their bonds before the Master, and of the report of David Wallerstein, Esq., Master, recommending the distribution of the fund amounting to $31,476.24, after payment of the costs and expenses of the proceedings, to the petitioners and other holders of the 1916 bonds whose bonds have been heretofore proved, and the same having been fully argued by counsel, and the Court being of opinion that the holders of the said 1916 bonds who have proved their bonds before the Master are not entitled to share in said fund for the reasons set forth in the opinion heretofore filed, it is ordered, adjudged, and decreed that the petition for a decree awarding said fund to petitioners and other holders of the 1916 bonds of the Pennsylvania Canal Company who have proved their bonds before the Master, be and the same is hereby denied, and the motion to confirm the report of the Master be, and the same is hereby, refused, and exceptions are allowed to petitioners.

By the Court.

(Sgd.) DICKINSON, *J.*

In the District Court of the United States for the Eastern District of Pennsylvania Sitting in Equity

ALICE FRANCES BROWN

vs.

PENNSYLVANIA CANAL CO., ET AL.

Bill in Equity. No. 677. April Sessions, 1911

55 *Decree*

And now, April 6, 1916, the above cause having come on to be re-argued upon final hearing upon Bill, Answer and Proofs, it is, upon due consideration.

Ordered, adjudged, and decreed that the decree made as of March 13, 1916, is vacated and annulled and the following substituted therefor:

(1) There are now outstanding bonds of the Pennsylvania Canal Company of the issue referred to in the Bill of Complaint to the amount in par value of the sum $1,948,000.00.

(2) Of the above sum, bonds to the amount of $348,000.00 are held by and belong to the Pennsylvania Railroad Company. Bonds to the amount of $7,000.00 belong to and are held by Alice Frances Brown, the plaintiff. Bonds to the amount of $1,557,000.00 belong to and are held by others.

(3) The said bonds were due and payable July 1, 1910, and there is due thereon the said principal sum of $1,948,000.00 together with lawful interest thereon from July 1, 1910.

(4) The said Canal Company is without assets or property and is unable to pay said moneys or any part thereof.

(5) The loss sustained by said bondholders through the act of said Pennsylvania Railroad Company in causing moneys to be diverted from the Sinking Fund provided for the payment of
56 the principal of said bonds, and in causing the moneys in said Sinking Fund to be invested in the bonds of the Canal Company and then canceled amounted, on July 1, 1910, to the sum of $1,379,941.28.

(6) The said Pennsylvania Railroad Company is directed to pay to Samuel Rea, trustee for said bondholders, the said sum of $1,379,941.28 with interest thereon from July 1, 1910, the same, when so received, to be disbursed and distributed by him to and among the said Alice Frances Brown and the other holders of said bonds of the Canal Company as the Court shall direct.

(7) The said Pennsylvania Railroad Company is adjudged and directed to pay to said plaintiff her costs and the costs of this proceeding.

By the Court,

(sgd.) DICKINSON, *J.*

Filed April 6, 1916

In the District Court of the United States for the Eastern District of Pennsylvania

Alice Frances Brown (Plaintiff) and Jay Cooke, 3rd, Edward Bailey and John Cadwalader (Intervening Plaintiffs)

vs.

Pennsylvania Canal Company and Pennsylvania Railroad Company (Defendants)

In Equity. April Sessions, 1911. No. 677

57 *Decree*

Filed October 4, 1917

And now, to-wit: this Fourth day of October, 1917, Report of David Wallenstein, Esq., Master appointed by the Court as per order dated February 3rd, 1917, having been filed, upon due consideration of said Report and of the Exceptions thereto, it is ordered, adjudged, and decreed as follows:

1. Samuel Rea, Trustee, is ordered and directed to pay out of the fund in his hands in this cause to David Wallerstein, Esq., Master, the sum of $20,000.00 as a fee, and also to pay the costs of advertising the Master's appointment and stenographer's costs as the same may be certified to him by the Master.

2. Said Samuel Rea, Trustee, is hereby ordered and directed to pay out of the fund in his hands in this cause to Jay Cooke, 3rd, Edward Bailey and John Cadwalader, intervening plaintiffs, the sum of $2,406.87, being expenses and costs incurred by them.

3. Said Samuel Rea, Trustee, is hereby ordered and directed to pay out of the fund in his hands in this cause to Thomas Raeburn White, Esq., and John Cadwalader, Jr., Esq., counsel for Alice Frances Brown, plaintiff, and Jay Cooke, 3rd, Edward Bailey and John Cadwalader, intervening plaintiffs, the sum of $200,000.00, being the amount allowed by the Court out of the said fund as counsel fees for producing said fund.

58 4. The balance of the fund remaining in the hands of Samuel Rea, Trustee, after paying the sums hereinbefore mentioned, and after adding thereto the amount of interest actually received by him from the Girard Trust Company of Philadelphia, with whom the said fund is deposited by Samuel Rea, Trustee, shall be applied to the payment of the principal of 1948 bonds of the Pennsylvania Canal Company of the issue in question now outstanding so far as the same have been proved before the Master according to the schedule attached to his Report and modified by his supplemental Report.

5. The said Samuel Rea, Trustee, is ordered and directed, under the supervision of the Master, to pay over and distribute to the holder of each one of the said bonds which have been proven before the

Master, according to the schedule attached to his Report, 1/1948 part of the fund in his hands, after making deductions and adding interest as hereinbefore ordered, provided, however, that payment shall not be made to William Manderson, Jane Manderson and Francis S. Manderson upon bonds proved by them until they have delivered to the said Samuel Rea, Trustee, a bond in form approved by the Master and with surety satisfactory to the Master conditioned for the repayment to the said Samuel Rea, Trustee, of the distributive share paid to the said Jane Manderson and Francis S. Manderson, in accordance with the Report of the Master.

6. The Master shall notify by registered mail the holders of each of the said bonds to whom distribution is directed to be made,
59 that they shall present their bond or bonds to the said Master for payment on the day fixed in the said notice, not less than five days after the mailing of the said notice; upon presentation of the said bonds the Master shall stamp upon each of the said bonds the actual amount to be paid upon each of the said bonds, and thereupon the said Samuel Rea, Trustee, shall pay to the holder of each of the bonds the amount so stamped, and said bonds shall be returned to the respective holders thereof.

7. The said Samuel Rea, Trustee, shall hold the balance of the fund remaining in his hands after such distribution, until further order of Court.

8. The Master is hereby ordered and directed to cause an advertisement to be inserted in the following newspapers: Public Ledger and Evening Bulletin and also in the Legal Intelligencer, once a week for three weeks, in such form as he shall deem proper, notifying all holders of the Pennsylvania Canal Company bonds of the issue in question who have not yet made proof of their claim, to present said bonds and make proof of ownership thereof to the Master on or before a day fixed in said advertisement, and said day to be not less than two weeks after the date of the last advertisement; or otherwise be forever barred from sharing in the fund in the hands of the said Samuel Rea, Trustee, or from making any claim thereon.

9. Within a reasonable time after the date fixed for the proving of such bonds as are not yet proved, the Master shall make a report to the Court.

(s) DICKINSON, *J.*

60 Certified Copy. D. C. Form No. 30

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania ss:

I, George Brodbeck, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of * * * that portion of the docket entries including December 10th, 1935, to September 24, 1936, Decree filed April 6, 1916, Decree filed October

4, 1917, Decree filed December 19, 1918, and Decree filed August 17, 1921, in the case of Alice Frances Brown (Plaintiff) and Jay Cooke, 3rd, Edward Bailey and John Cadwalader (Intervening Plaintiffs) vs. Pennsylvania Canal Company and Pennsylvania Railroad Company (Defendants) No. 677, April Sessions, 1911 * * * now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the sale of the aforesaid Court at Philadelphia this thirtieth day of September, A. D. 1936.

GEORGE BRODBECK, *Clerk 1.*
By (Signature illegible),
Deputy Clerk.

[Seal of the District Court of the United States.]

61 In Court of Common Pleas No. 5 of Philadelphia County

Decree of escheat

And now, to wit, this 1st day of October, 1936, this cause having come on before the Court, for hearing on Amended Petition for Escheat of certain moneys, and upon the answer thereto of the United States of America, and all other proceedings, and after hearing duly had, upon notice duly given, in accordance with the order of the Court, to all parties in interest,

It Is Ordered and Decreed that

Whereas, in the matter of Alice Frances Brown et al. v. Pennsylvania Canal Company et al. No. 677 in equity of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919 and

Whereas, thereafter on June 26, 1926, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,-

874.49 is Hereby Declared Escheated to the Commonwealth of

62 Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the

said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court,

(Sgd.) FRANK SMITH, *J.*

In Court of Common Pleas

Petition for rehearing

To the Honorable, the Judges of the said Court:

The Petition of the United States of America, by J. Cullen Ganey, Assistant United States Attorney for the Eastern District of Pennsylvania, respectfully represents:

1. That on the 1 day of October 1936, a hearing was had by your Honorable Court on the Petition of Philip Klein, Escheator of the Commonwealth of Pennsylvania, to which answer was made by the United States of America, wherein the said Philip Klein prayer for a judgment of escheat.

2. That after hearing on the first day of October 1936,
63 your Honorable Court allowed the prayer of the Petitioner and decreed a judgment of escheat in the sum of $16,874.49.

3. Your Petitioner is advised, believes and therefore avers that there is additional evidence essential to the proper consideration of the cause of the United States Government, which should be presented to your Honorable Court in order that the interests of the United States of America may be properly protected.

Wherefore, your Petitioner prays that it be granted a rehearing of the cause at which time additional evidence of the United States Government may be considered. And your Petitioner will ever pray.

J. CULLEN GANEY,
Assistant United States Attorney.

[Duly sworn to by J. Cullen Ganey, jurat omitted in printing.]

64 *Rule to show cause*

And Now, to wit: this 23 day of November 1936, upon consideration of the within Petition, a Rule is entered on Philip Klein, Escheator of the Commonwealth of Pennsylvania, to show cause why the Order granted October 1st, 1936, in the above mentioned case should not be set aside and rehearing held.

Returnable 30 day of Nov. 1936. 10 a. m. Room K.

All proceedings to stay in the meanwhile.

SMITH, *J.*

Order

Dec. 16, 1936. Rule absolute insofar as it applies to a rehearing.

In Court of Common Pleas No. 5 of Philadelphia County

Final decree

And now, to wit, this 8th day of January 1937, this cause having come on before the Court for rehearing on Petition of the United States Attorney, and after rehearing duly had,

It Is Ordered that the decree entered by this Court on October 1, 1936, be reaffirmed as follows:

It is Ordered and Decreed that

65 Whereas, in the matter of Alice Francis Brown et al. v. Pennsylvania Canal Company et al., No. 677 in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

Whereas, thereafter, on June 26, 1936, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas, the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 Is Hereby Declared Escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court.

ALESSANDRONI, *J.*

66 In Court of Common Pleas

Exception to decree of the court

And Now, this 3rd day of February, 1937, the United States of America, by Charles D. McAvoy, United States Attorney for the Eastern District, excepts to the decree of the Court entered Janu-

ary 8, 1937, reaffirming the decree of Escheat entered by the Court on October 1, 1936, which is as follows:

"It is ordered and decreed that

"Whereas, in the matter of Alice Frances Brown et al. v. Pennsylvania Canal Company et al., No. 677, in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

"Whereas, thereafter, on June 26, 1936, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code, 852, and

"Whereas, the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 is hereby declared escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to Prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court.

ALESSANDRONI, *J.*
CHARLES D. MCAVOY,
United States Attorney.

And Now, this 3rd day of February 1937, exception is allowed.

ALESSANDRONI, *J.*

In Supreme Court of Pennsylvania

January Term, 1937

Docket entries

Grover C. Ladner, A. Jere Creskoff. 2-8-37. Chas. D. McAvoy, U. S. Attorney. J. Cullen Ganey, Asst. U. S. Atty. In the Matter of: Escheat of Money in the Custody of the U. S. Treasury, Appeal of: U. S. of America. No. 1820, December Term, 1934, from the Decree. In Equity.

Appeal from Court Common Pleas #5 of the County of Philadelphia, Filed February 4, 1937, Eo die Certiorari exit, Retbls. third Monday April, 1937.

February 15, 1937. Record returned and filed.
April 14, 1937. Assignments of Error filed.
April 21, 1937. Argued.
May 17, 1937. Decree as stated, affirmed.
Per Curiam.
May 28, 1937. Remittitur exit and with record sent to: Prothonotary of Philadelphia County.
Eo die Acknowledgment of Remittitur and record received and filed.
August 14, 1937. Petition for Appeal to the Supreme Court of the United States received in this office.
August 14, 1937. Statement of Jurisdiction received in this office.
August 14, 1937. Assignments of Error received in this office.
August 14, 1937. Order allowing appeal to the Supreme Court of the United States, received in this office as follows:
Ordered and Adjudged that the appellant herein, the United States of America, be and it is hereby allowed an appeal from the order and judgment of this Court affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, and that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States.
It is further—
Ordered, that the United States of America be and it is hereby permitted a period of 40 days from the date hereof in which to file and docket this appeal to the Supreme Court of the United States.
This the 14th day of August 1937.

(Signed) Owen J. Roberts,
Associate Justice of the Supreme Court of the United States.

69 August 17, 1937. Affidavit of Service of Petition for Allowance of Appeal to the Supreme Court of the United States, copy of Assignments of Error and copy of Statement, etc., filed.

Thomas J. Curtin.

August 28, 1937. Citation, signed by Justice Owen J. Roberts, received in this office and filed.
September 2, 1937. Motion to dismiss appeal or to confirm decree of the Court below and Appellee's Statement of Grounds making against jurisdiction of Supreme Court of the United States, received in this office and filed.
September 13, 1937. Praecipe for Record, with acceptance of service, received in this office, and filed.

70 In Supreme Court of Pennsylvania for the Eastern District

[Title omitted.]

Appeal and affidavit

Filed Feb. 4, 1937

Enter appeal on behalf of U. S. of America from the Decree of the Court of Common Pleas of the County of Philadelphia Returnable:

(Signed) CHAS. D. McAVOY,
U. S. Attorney.
(Signed) J. CULLEN GANEY,
Asst. U. S. Atty.,
Attorneys for Appellant.

To Thomas Robins, Prothonotary Supreme Court—Eastern District, County of Philadelphia, *ss:*

J. Cullen Ganey, being duly sworn, saith that said Appeal is not taken for the purpose of delay, but because Appellant believes it has suffered injustice by the decree from which appeal.

Sworn and subscribed this 4th day of Feb. A. D. 1937.

[SEAL] J. CULLEN GANEY.
(Signed) MAY C. REESE, *Chief Clerk.*

[File endorsement omitted.]

11 In Supreme Court of Pennsylvania, Eastern District
[Title omitted.]

Assignment of error

Filed April 14, 1937

The United States of America, by Guy K. Bard, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney for said District, respondent below files the following Assignment of Error:

1. The Court erred in entering its Decree of Escheat (R. p. 64a).

"And Now, to wit, this 8th day of January, 1937, this cause having come on before the Court for rehearing on Petition of the United States Attorney, and after rehearing duly had,

"It is Ordered that the decree entered by this Court on October 1, 1936, be reaffirmed as follows:

"It Is Ordered and Decreed that

"Whereas, in the matter of Alice Frances Brown et al. v. Pennsylvania Canal Company et al. No. 677 in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

"Whereas, thereafter, on June 26, 1936, these moneys were deposited to the credit of the Treasury of the United States, subject

to the order of the Court from which the said mone
72 were received, to wit, the aforementioned United States D
trict Court for the Eastern District of Pennsylvania, und
the provisions of the Act of Congress of March 3, 1911, C 224, E
vised Statutes 996; 36 Statutes 1083, 28 United States Code 852, a

"Whereas, the original owners of the said moneys have been u
known for a space of seven years and more, the said sum of $16,874.
Is Hereby Declared Escheated to the Commonwealth of Pennsy
vania, and Philip Klein, Escheator, duly appointed under the la
of the Commonwealth of Pennsylvania to prosecute the claim of t
Commonwealth of Pennsylvania to these moneys, is hereby directed
make application to the United States District Court for the Easte
District of Pennsylvania for an Order by the *the* said Court dire
ing the payment of the said moneys to the said Philip Klein
Escheator of the Commonwealth of Pennsylvania in accordance wi
the acts of Congress in such case made and provided.

"By the Court,

"ALESSANDRONI, *J.*"

on the ground that the State Statute is unconstitutional in that:

(a) It constitutes an interference with the Federal Courts.

(b) It is an unlawful attempt on the part of the General Assemb
of the Commonwealth of Pennsylvania to exercise sovereignty ou
side the jurisdiction of the State.

(c) It is an unwarranted infringement on the sovereignty pow
of the United States of America.

(Signed) Guy K. Bard,
GUY K. BARD,
United States Attorney.

(Signed) Thomas J. Curtin,
THOMAS J. CURTIN,
Assistant United States Attorney.

[File endorsement omitted.]

73 In Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Notice of appeal

Filed Feb. 8, 1937

To Appellee or his Counsel:

You are hereby notified that on Feb. 3, 1937, an appeal was tak
to the Supreme Court in the above-entitled case.

(Signed) CHARLES D. MCAVOY,
U. S. Atty.

(Signed) J. CULLEN GANEY,
Asst. U. S. Atty.
Attorneys for Appellant.

Feb. 5th, 1937, service of the foregoing notice is hereby accepted and the Prothonotary of the Supreme Court is directed to enter the appearance of the undersigned for the appellee.

(Signed) GROVER C. LADNER.
(Signed) A. JERE CRESKOFF.

NOTE.—Please return this acceptance of service to Room 456, City Hall. Attention is also called to the following rule, especially so much thereof as refers to filing proof of service of notices in the court below:

Rule 58. Immediately upon taking his appeal appellant shall serve notice thereof on the opposite party or his counsel; on the stenographer who took the testimony, if the official transcript thereof has not been filed; also on the judge who made any ruling or rendered any order, judgment, or decree, of which appellant complains and the reasons for which do not already appear of record; and shall promptly file in the court below proof of the service of such notices. A failure to comply with this rule and promptly to serve notice on the court below, with a concise statement of the matters complained of and regarding which it is alleged the reasons therefor do not appear of record, may be considered as a waiver of all objections to the ruling, order, judgment, or decree in question. On receipt of the notice here required, the official stenographer shall forthwith proceed to have his notes transcribed, approved and filed, and the court below shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the ruling, order, judgment, or decree therein referred to, or shall specify in writing the place in the record where such reasons may be found, and this opinion or writing shall be attached to the record and printed as part thereof.

[File endorsement omitted.]

74 In Supreme Court of Pennsylvania, Eastern District

No. 164, January Term, 1937

IN THE MATTER OF ESCHEAT OF MONEYS IN CUSTODY OF UNITED STATES TREASURY. APPEAL OF UNITED STATES OF AMERICA

Appeal From Decree of Court of Common Pleas No. 5 of Philadelphia County

Opinion of the court

Filed May 17, 1937

PER CURIAM:

The previous history of this deposit is set forth in In re Escheat of Monies in Custody of U. S. Treasurer, 322 Pa. 481. We there held that the court below had jurisdiction to decide under State laws the

ownership of the fund and the record was remanded to determ whether or not the money was escheated.

This appeal restates the arguments of the United States agai the jurisdiction of the court below. Since no new matter is p sented, we affirm so much of the decree of the court as follows:

"Whereas, in the matter of Alice Frances Brown et al. v. Penns vania Canal Company et al., No. 677 in equity, of the United Sta District Court for the Eastern District of Pennsylvania, moneys the amount of $16,874.49 were paid into the Registry of the Uni States District Court for the Eastern District of Pennsylvania January 22, 1919, and

"Whereas, thereafter, on June 26, 1936, these moneys were dep ited to the credit of the Treasury of the United States, subject to order of the Court from which the said moneys were received, wit, the aforementioned United States District Court for the East District of Pennsylvania, under the provisions of the Act of C gress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statu 1083, 28 United States Code 852, and

"Whereas, the original owners of the said moneys have b unknown for a space of seven years and more, the said sum $16,874.49 is hereby declared escheated to the Commonwealth Pennsylvania, and Philip Klein, Escheator, duly appoin under the laws of the Commonwealth of Pennsylvania to pro cute the claim of the Commonwealth of Pennsylvania to th moneys * * *."

Decree as stated affirmed.

75 In Supreme Court of Pennsylvania

[Title omitted.]

Acknowledgment of receipt of remittitur, etc.

Filed May 28, 1937

May 28 1937, received from the Supreme Court of Pennsylvan Eastern District, the record, remittitur and copy of the opinion of Court, in the above entitled case.

(Signed) H. G. Hoerr

[File endorsement omitted.]

76 In Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Petition for appeal to the Supreme Court of the United State

Filed Aug. 14, 1937

Comes now the United States of America, appellant herein, s states that on the 17th day of May 1937, the decision of the Court

Common Pleas No. 5 of Philadelphia County decreeing the escheat of certain moneys in the Treasury of the United States was by this Court sustained, and the United States, feeling aggrieved at the ruling of this Court affirming said decree, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment order, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The petitioner submits and presents to the Court herewith a statement showing the basis and jurisdiction of the Supreme Court to entertain an appeal in this cause.

J. Cullen Ganey,
J. CULLEN GANEY,
United States Attorney for the
Eastern District of Pennsylvania.

[File endorsement omitted.]

87 [Opinion, Linn, J., omitted. Printed side page. 27 ante.]

101 In Supreme Court of Pennsylvania, Eastern District.

[Title omitted.]

Assignment of errors

Filed Aug. 14, 1937

Comes now the United States of America, by J. Cullen Ganey, United States Attorney for the Eastern District of Pennsylvania, and avers that in the record proceedings and judgment herein there is manifest error against the just right of the appellant, and that the Court erred:

1. In holding that the escheat laws of the State of Pennsylvania, as amended by the acts of May 16, 1935, and June 28, 1935, providing for the escheat of moneys or property deposited in the custody of or under the control of any court of the United States in and for any district within the State of Pennsylvania was constitutional.

2. In failing to hold that such laws were unconstitutional because they constituted an interference with courts of the United States.

3. In failing to hold that the acts were unconstitutional because they constituted an unwaranted infringement on the sovereign power of the United States of America.

102 4. In failing to hold that the acts constituted an unlawful attempt to exercise sovereignty outside the jurisdiction of the State of Pennsylvania contrary to the Fourteenth Amendment to the Constitution of the United States.

5. In holding that the acts conferred jurisdiction to escheat money in the Treasury of the United States.

6. In affirming the judgment and decree of the Court of Common Pleas No. 5, Philadelphia County.

This 14 day of August, A. D. 1937.

J. Cullen Ganey,
J. CULLEN GANEY,
United States Attorney for the Eastern District of Pennsylvania.

103 [File endorsement omitted.]

104 In Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States.

Filed Aug. 14, 1937

This cause having come on this 14th day of August, 1937, before this Court on the petition of the United States of America, appellant in the above-entitled cause, praying an appeal to the Supreme Court of the United States for reversal of the judgment herein affirming the judgment and decree of the Court of Common Pleas No. 5 of Philadelphia County and that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered this motion, together with appellant's statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court—

Ordered and adjudged that the appellant herein, the United States of America, be and it is hereby allowed an appeal from the order and judgment of this Court affirming the judgment of the Court of Common Pleas No. 5 of Philadelphia County, and that a duly certified copy of the record of this cause be transmitted to
105 the Clerk of the Supreme Court of the United States. It is further—

Ordered that the United States of America be and it is hereby permitted a period of 40 days from the date hereof in which to file and docket this appeal to the Supreme Court of the United States.

This the 14th day of August, 1937.

OWEN J. ROBERTS,
Associate Justice of the Supreme Court of the United States.

106 [File endorsement omitted.]

[Citation in usual form omitted in printing.]

In Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Praecipe for record

Filed Sept. 13, 1937

To the PROTHONOTARY,
Supreme Court of Pennsylvania.

SIR: You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States pursuant to appeal allowed in the above entitled cause, and to include in such transcript of record the printed record as presented for argument in said cause, the docket entries of the Supreme Court of Pennsylvania, and all papers filed in that Court.

(Signed) J. CULLEN GANEY,
United States Attorney.
(Signed) THOMAS J. CURTIN,
Assistant United States Attorney.

Service of the above Praecipe is hereby acknowledged.

(Signed) A. JEFF CRESKOFF,
Attorney for Appellees.

Date 9-13-37.

[File endorsement omitted.]

[Prothonotary's certificate to foregoing transcript omitted in printing.]

[Certificate of Chief Justice to prothonotary omitted in printing.]

[Prothonotary's certificate to Chief Justice omitted in printing.]

In Supreme Court of the United States

Statement of points relied upon and designation of entire record for printing

Filed Oct. 16, 1937

Pursuant to Rule 13, Par. 9 of this Court, the Appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record, as filed in the above entitled cause, necessary for the consideration of the points relied upon.

Stanley Reed,
STANLEY REED,
Solicitor General.

Service of Statement of Points acknowledged.

A. JERE CREEKOFF,
Of Counsel for Appellee.

[File endorsement omitted.]

(Endorsement on cover:) File No. 41,920. Pennsylvania Supreme Court. Term No. 439. The United States of America, Appellant v. Philip Klein, Escheator of the Commonwealth of Pennsylvania. Filed September 20, 1937. Term No. 439 O. T. 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1

In the Supreme Court of Pennsylvania
Eastern District

No. 164. JANUARY TERM, 1937

IN THE MATTER OF ESCHEAT OF MONEYS IN CUSTODY OF THE UNITED STATES TREASURY

STATEMENT OF JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America herewith submits its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The statutes of the State of Pennsylvania which were held to be valid, but which the United States contended were unconstitutional and in conflict with the laws of the United States, are certain escheat acts set forth in Purdon's Pennsylvania Statutes, Title 27, Secs. 41, 45, 283, and 334. The acts in question read as follows:

SEC. 45. Every court having jurisdiction in cases of escheat shall, after the determination of each and every case, file of record a finding or adjudication, which shall set forth:

I. Whether an escheat hath occurred or not.

II. In what manner and for what cause the said escheat hath occurred, with the full name of the intestate, if any there be, or of the person who was last seized or possessed of the property in question.

III. What estate, real or personal, hath escheated, and what is the value thereof.

IV. Where said estate, real or personal, is situated, and in whose possession the same then is.

And in case the said court shall find that any property, real or personal, hath escheated, the same shall be awarded to the escheator for and on behalf of the commonwealth (1889, May 2, P. L. 66, Sec. 10).

SEC. 41. That the jurisdiction in all cases of escheat under the provisions of this act, shall be vested in the courts of this Commonwealth, as follows, namely:

Whenever an escheat shall occur or be supposed to occur by reason of any person dying intestate, without heirs or known kindred, a widow or surviving husband, the orphans' court of the county wherein said decedent was resident at the time of his death, or in case said decedent was not at the time of his death resident within this

Commonwealth, then the orphans' court of the county in which the greater part of his property, real and personal, shall be situate, shall have jurisdiction.

Whenever an escheat shall occur, or be supposed to occur, of any property, estate, or effects deposited in the custody of any court, or with any depository, receiver, or other officer thereof, the owner whereof shall be unknown, and whenever any escheat shall occur or be supposed to occur of any property, estate, or effects held by any trustee or other person in a fiduciary capacity, who shall have filed an account thereof in any court of this Commonwealth, by reason of the fact that the cestui que trust or beneficial owner thereof shall be unknown, then and in such case, the court in which, or in the custody of any depository, receiver, or other officer of which said property, estate, or effects may have been or shall be deposited, whether the same be real or personal, or in which said account has been or may be duly filed, shall have jurisdiction; and whensoever any property, estate, or effects held by any trustee or trustees under any trust, or held by and resulting to such trustee or trustees from the exercise of the trust, or resulting after the termination of the trust and before distribution is actually made under the terms of the trust or decree of court, from rents, accretions, profits, or interest from, of, or on the trust property, or any part thereof, shall escheat or be supposed to

escheat by reason of the fact that such property, estate, or effects has no lawful owner, the court of common pleas of the county in which such property, estate, or effects, or the greater part thereof, shall be located, shall have jurisdiction, except in cases where the trustee shall be a corporation, in which cases the court of common pleas of the county wherein the principal office of such corporation is located shall have jurisdiction.

Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk, or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth. (As amended 1935, June 28, P. L. 475, Sec. 2.)

SEC. 282. After any particular deposit of money, made with every person, copartnership, bank, national bank, safe deposit company, trust company, association, and corporation, and savings fund, savings institution, and savings bank, shall not have been increased or decreased, or if not increased or decreased, shall not be known to have been credited with interest, on the passbook or certificate of deposit of the depos-

itor at his request, for the period of ten successive years in all cases, except savings funds, savings institutions, and savings banks, and in the case of savings funds, savings institutions, and savings banks shall not have been so increased, decreased, or credited for a period of twenty-one years, the same shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest thereon actually accrued to the date of the decree for the escheat of the same, whether such deposit was, at the expiration of said period, in the possession of the depositary with which it was originally deposited, or in the possession of another depositary which took over mediately or immediately, in any manner, whether before or after the expiration of said period of ten years or twenty-one years, as the case may be, the deposits of the depositary with which the deposit was originally made.

After the owner, beneficial owner, or person entitled to any of the following named moneys or property, shall be and remain unknown, or the whereabouts thereof shall have been unknown, for the period of seven successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same, namely:

(a) Moneys or other estate of any kind whatsoever held by any person, bank, na-

tional bank, trust company, or other association, or corporation, as guardian, committee, executor, administrator, assignee, or receiver, or as trustee under or by reason of a dry trust or under or by reason of any other trust the active duties of which have terminated except the delivery or payment to the beneficiaries thereunder of the subject of the trust, and any increments accrued thereon.

(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal court in and for any district within the Commonwealth, or in the custody of any officer of any such court.

After any moneys or property held by any person, bank, national bank, trust company, or other corporation, or by any association, limited partnership, or copartnership, belonging to any other person, the escheat of which is not otherwise provided for in this section, has been and remained unclaimed, by the person for whom the same is held, for the period of seven or more successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

After any dividend or dividends, profit or profits, declared by any bank, national bank, trust company, or other corporation, or as-

sociation, or by any partnership, and after any debt or interest on any debt or debts owed by any such bank, national bank, trust company, or corporation, association, or co-partnership, shall have been and remained due and unpaid for three successive years, such dividends or profits, debt or interest on debt, shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

Such escheat shall, at the suggestion of the Auditor General, be determined and enforced by an action in the nature of a bill in equity, filed by and in the name of the Attorney General, against the depositary, fiduciary, or debtor, and all of his or its depositors, beneficiaries, or creditors for whom he or it holds unclaimed moneys escheatable under the provisions of this act, in the appropriate court for the county where the debtor, if an individual, resides, or, if a corporation, where it maintains its principal office. Such action shall be brought in the court of common pleas, except: (a) Where it is sought to escheat unclaimed trust funds, in which case the same shall be brought in the court having jurisdiction of such funds; and except (b) where it is sought to escheat moneys paid into or deposited in a court or in the custody of any officer thereof, in which case such action shall be brought in the court into which the

money was paid, or in which it was deposited, or in the custody of an officer of which court the said moneys are.

When the moneys have been paid into and are in the custody of any court, the escheat of the same shall be determined and enforced, at the suggestion of Auditor General, by a petition filed by the Attorney General in said court, upon which proceedings shall be had as in other cases of escheat provided for by this section. Proceedings for the escheat of moneys in the possession or custody of any officer of any court shall be by a bill as provided for by this section in other cases, in which bill such officer and the persons entitled to such moneys shall be made codefendants.

Any such escheat proceedings may be prosecuted whether the deposits, dividends, moneys, funds, or other property or estate sought to be escheated, shall have been reported to the Auditor General in conformity with the provisions of this act or have not been so reported. Any number of items may be joined in one action against one debtor, though owed to different creditors.

If service of the bill can not be had on the creditors defendant within the State, service shall be made by publication for two successive weeks, in a newspaper of general circulation, published in the county in which the debtor is resident or has its principal office, and also, when practicable, for the same period, in such a newspaper published in the county, within or without the Com-

monwealth, where, when last heard from by the debtor, the creditor had his residence. Publication may be made in such form as the court shall direct, and need not contain any order or other paper in full.

If such creditors or their legal representatives shall appear in the cause within the time limited by the court, and establish their right to recover said sums from the debtor but for the provisions of this act, and if this right shall not be barred by the statute of limitations or presumption of payment, a decree shall be made for the payment of said sums to them after paying their proportionate part of the costs of the cause and of said advertising: *Provided,* That such persons, on demand, may have any issue of fact determined by a jury; and if they shall not so appear and establish such right, a decree shall be made that said sums have escheated and shall be paid by the debtor to the State Treasurer for the use of the Commonwealth; and the amount of such decree shall bear interest at the rate of twelve per centum per year from sixty days after the same is made; and such decree shall be effectual to bar the creditors from claiming the said sums from the debtor. An appeal may be taken, by either or any party to such action, to the Supreme Court, at any time within thirty days after the date of the decree issued therein.

An action may be begun, in the nature of a bill for discovery merely with respect to

the subject matter of this act, whether in this or other sections hereof, against the debtor, without the necessity of specifying the items which should escheat, with the right to compel an answer under oath, to subpoena all persons as witnesses, and to compel the production of all books, papers, and records; and from time to time the bill may be amended to pray for the escheat of specific items under this section seven, and to make parties to the bill the creditors as ascertained. (As amended 1935, May 16, P. L. 195, Sec. 1.)

* * * * *

SEC. 334. That whensoever any money, estate, or effects, shall have been, or shall hereafter be paid into, or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk, or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same. (As amended 1935, June 28, P. L. 475, Sec. 1.)

The date of the judgment filed in the Supreme Court of Pennsylvania is May 17, 1937. The petition for an appeal in this case is dated 14 day of August, 1937.

THE NATURE OF THE CASE AND THE RULINGS BELOW

On December 11, 1934, a petition was filed in the Court of Common Pleas No. 5 of Philadelphia County, praying that an escheat be declared as to all unclaimed moneys paid into the Registry of the United States Court for the Eastern District of Pennsylvania in the case of *Brown* v. *Pennsylvania-Canal Company*. This money, pursuant to law, had been transferred to the Treasury of the United States. On February 14, 1935, the United States Attorney moved to dismiss the petition on the ground that the State statutes relating to escheat in so far as they attempt to apply the moneys in the custody of the United States or of its courts are unconstitutional and void; and, furthermore, that the funds sought to be escheated were in the Treasury of the United States and therefore not within the jurisdiction of the courts of Pennsylvania. On February 21, 1935, an order was entered, refusing the prayer and the petition. Thereafter, these statutes were amended by the acts of May 16, 1935, and June 28, 1935, and on July 18, 1935, the Court of Common Pleas, in effect, dismissed the petition. The petitioner appealed to the Supreme Court of Pennsylvania, which court on June 26, 1936, filed an opinion which held the acts, as amended, to be constitutional, reversed the judgment of the lower court, and remanded the case for further proceedings.

The case was thereupon again tried in the Court of Common Pleas upon the pleadings theretofore filed and the court thereafter decreed an escheat had taken place in respect of the moneys in the hands of the United States Treasury. The United States filed a petition for a rehearing, which rehearing was allowed on December 16, 1936.

On the 8th day of January 1937, the court again held that the moneys had escheated to the State of Pennsylvania. The Government again appealed to the Supreme Court of Pennsylvania, raising the question of the constitutionality of the law by assignment of errors in its brief. On May 17, 1936, the Supreme Court of Pennsylvania affirmed the order of the Court of Common Pleas holding that an escheat had taken place.

The question presented is one of substantial importance, as considerable sums are held by clerks of United States Courts in Pennsylvania which would be liable to escheat, and, in some instances, actions have been commenced to decree an escheat. Furthermore, a similar situation might arise in other states through the enactment of appropriate statutes.

The following cases are believed to sustain the jurisdiction of the Supreme Court. *Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 155; *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; *Barwise* v. *Sheppard*, 299 U. S. 33; *DeJonge* v. *Oregon*, 299 U. S. 353.

There are appended hereto copies of the opinions of the Supreme Court of Pennsylvania filed June 26, 1936, and May 17, 1937, and copies of opinions of the Court of Common Pleas filed July 18, 1935, January 21, 1936, October 1, 1936, and January 8, 1937, respectively.

Respectfully submitted.

STANLEY REED,
Solicitor General.

J. CULLEN GANEY,
United States Attorney for the Eastern District of Pennsylvania.

OPINION OF THE SUPREME COURT

(Filed June 26, 1936)

(Reported in 322 Pa. 481)

LINN, J.:

The Commonwealth, by Klein, its escheator, filed this petition averring that in certain equity proceedings in the District Court of the United States for the Eastern District of Pennsylvania (At April Sessions, 1911, No. 677, *Alice Frances Brown et al.* v. *Pennsylvania Canal Company and others.* See also *Rea* v. *Pennsylvania Canal Company,* 245 Pa. 589, 91 A. 1053), certain sums were found to be due and payable to described bondholders; that some creditors, so found to be entitled, had not claimed payment, whereupon the court directed that such unclaimed funds be paid into its registry; that after the lapse of five years (in accordance with the Act of May 29, 1920, C. 214, Section 1, 41 Stat. 654, 28 U. S. C. A., section 851) the unclaimed moneys were deposited to the credit of the Treasury of the United States. The petition averred that "such deposit (was) made by a bookkeeping entry in the Federal Reserve Bank in the City of Philadelphia, transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania to the account of the Treasury of the United States." The petition also set forth that the Act of Congress (Act of March 3, 1911, C. 224, 36 Stat.

1083, 28 U. S. C. A., section 852) provided "Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders."

The Commonwealth averred that the unclaimed money escheated to it; that in April 17, 1934, a petition on its behalf was filed in the District Court (to March Term, 1934, No. 8123) for an order directing payment, as an escheat, to the Commonwealth; and that on September 6, 1934, an opinion was filed by Dickinson, J., dismissing the petition for want of jurisdiction and without prejudice.

Petitioner averred that a decree of escheat was necessary to qualify its escheator under the decision of the District Court and the Act of Congress to present, in that Court, the claim of the Commonwealth as the person entitled to the escheat.

Notice of the petition was given to the United States Attorney for the Eastern District of Pennsylvania; he appeared specially and moved to dismiss for want of jurisdiction, assigning the following reasons:

(a) The Common Pleas Court of Philadelphia for the State of Pennsylvania has no jurisdiction to entertain the Petition above mentioned in that this court cannot exercise jurisdiction as the state statutes are

void insofar as they attempt to escheat moneys in the custody of the United States or in the custody of its court.

(b) The funds sought to be escheated are in the Treasury of the United States as is alleged in the Petition and therefore are not within the jurisdiction of the Courts of Pennsylvania.

(c) The state law confers no jurisdiction upon any state court for the escheat of funds in the Treasury of the United States.

The petition was dismissed and the Commonwealth has appealed.

The Act of May 2, 1889, P. L. 66 and amendments and supplements provide for escheat proceedings. In this case the Commonwealth depends on the following amendment of June 28, 1935, P. L. 472: "Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk, or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth."

We all agree that the learned court erred in dismissing the petition for want of jurisdiction. The power to declare an escheat is in the Commonwealth. It is a power that was not delegated to the federal government, though its exercise by a State may be restricted in the fields where the power of Congress is exclusive; cf. *First National*

Bank v. *State of California*, 262 U. S. 366. "The regulation of the title and devolution of property within its limits is within the control and jurisdiction of the State": *Cunnius* v. *Reading School District*, 206 Pa. 469; 56 A. 16. The property under discussion is a debt payable by a debtor who deposited the money for distribution pursuant to a decree in an equity proceeding pending in the District Court. The money is still held under its control, pursuant to the Act of Congress, for the purpose for which it was paid. "That the debt due the absentee by the School District resulting from the establishment of her dower was within the jurisdiction of the state authority is clear": *Cunnius* v. *Reading School District*, 198 U. S. 458, 467. As the Commonwealth merely asks for a declaration of escheat and does not desire an order of payment directed to any federal agency there would seem to be no objection to considering the proceedings as in personam: cf. *Security Bank* v. *California*, 263 U. S. 282, 287.

The United States Attorney does not claim that the property has escheated to the federal government or that the federal government can escheat it. His contention is that the State has no power "to escheat moneys presently in the Treasury of the United States." It is well settled that the State has power to take possession of unclaimed property as an escheat. *Security Savings Bank* v. *California*, 263, U. S. 282, supra; *Com.* v. *Dollar Savings Bank*, 259 Pa. 138, 102 A. 569; *Germantown Trust Co.* v. *Powell*, 265 Pa. 71, 108 A. 441. It may be conceded that the State cannot take possession of property in the custody of the federal govern-

ment, but that fact need not prevent the judicial determination by the State of the succession to unclaimed property within its borders. The argument made for the Commonwealth concedes that the State court can make no order on the federal treasury or on any other representative of the federal government, requiring the delivery of the property to the escheater; but the contention is that as the District Court, in the proceeding brought by the escheater and referred to above, held that the court lacked power to declare an escheat (The learned district judge said: "The act of congress which makes these moneys subject to the award of this Court does so only in favor of 'any person or persons, corporation or company' who can lay successful claim of ownership thereto. Assuming arguendo the state to be within this Act it is able as yet to show no title to these moneys. Under the facts it may or may not be able to secure a judgment of escheat but it has not done so. Counsel for petitioner recognize this and hence ask this court to enter such a judgment. Have we the jurisdictional power to do so? * * * The real position of the petitioner is that the State Statutes have conferred jurisdiction upon no State Court to enter Judgment to escheat these moneys but they have conferred it upon this court. This they cannot do, and we in consequence have no such power. * * * The State has no title and no title by escheat can be acquired otherwise than by a compliance with these statutes. When the petitioner is able to show title to these moneys it will then be our duty to pass judgment upon the title set up") and dismissed his petition without prejudice, this proceeding in the

State Court was necessarily instituted to determine the fact of escheat, and, the fact being found to enable the Commonwealth then to present its claim to the District Court in control of the fund pursuant to the Act of Congress. In the circumstances, therefore, we think the court should have proceeded with the case and should have made such determination as the evidence may require, and if an escheat were found, to have restricted the enforcement of its order to the proper presentation of the Commonwealth's claim in the District Court to enable that court to determine whether payment should be made to the Commonwealth. Such an order would seem to be within the following language of the Chief Justice in *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463: "This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States.' *Taylor* v. *Carryl*, 20 How. 583, 595." See, too, *Territory of Alaska* v. *First Nat. Bank*, 22 F. (2d) 377; *same* v. *same*, 41 F. (2d) 186.

The order appealed from is reversed and the record is remitted for further proceedings.

THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT,

City and County of Philadelphia, ss.

IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 164, JANUARY TERM, 1937

IN THE MATTER OF ESCHEAT OF MONEYS IN CUSTODY OF UNITED STATES TREASURY. APPEAL OF UNITED STATES OF AMERICA

Appeal From Decree of Court of Common Pleas No. 5 of Philadelphia County

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Opinion of the court

PER CURIAM:

The previous history of this deposit is set forth in *In re Escheat of Monies in Custody of U. S. Treasurer,* 322 Pa. 481. We there held that the court below had jurisdiction to decide under State laws the ownership of the fund, and the record was remanded to determine whether or not the money was escheated.

This appeal restates the arguments of the United States against the jurisdiction of the court below. Since no new matter is presented, we affirm so much of the decree of the court as follows:

> Whereas, in the matter of *Alice Frances Brown et al.* v. *Pennsylvania Canal Company et al.*, No. 677 in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of

the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

Whereas thereafter, on June 26, 1936, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 is hereby declared escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys * * *

Decree as stated affirmed.

Opinion sur petition for escheat

(Filed July 18, 1935)

LAMBERTON, *J.*:

Philip Klein, as Escheater of the Commonwealth of Pennsylvania, filed his Petition in which he averred that on May 2, 1911, a proceeding was filed in the United States District Court for the Eastern District of Pennsylvania, as of April Sessions 1911, No. 677, under the caption of *Alice Frances Brown, et al.* v. *Pennsylvania Canal Company,*

Pennsylvania Railroad Company, et al.; that in said proceeding a Bill of Complaint was filed asking that The Pennsylvania Railroad Company be required to pay the principal of certain bonds to the owners thereof; that an Order was duly made by Honorable Oliver B. Dickinson, Judge of said Court, in favor of the bondholders; that the owners of certain bonds could not be located, and the Court ordered the moneys payable to such bondholders to be paid into the Registry of the United States District Court for the Eastern District of Pennsylvania, which was accordingly done on April 22, 1919; that the moneys remaining in the Registry of the Court were, on June 30, 1926, paid into the Treasury of the United States under the provision of an Act of Congress providing as follows:

> In every case in which the right to withdraw money so deposited (in a depositary of the United States) has been adjudicated or is not in dispute, and such money has remained deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of the said Court, or its successor, to cause such money to be deposited in the Treasury of the United States in the name and to the credit of the United States. Any person or persons, or any corporation or company, entitled to such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States Attorney, and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant.

That said money still remains unclaimed, and is escheatable to the Commonwealth of Pennsylvania under the Acts of Assembly of said Commonwealth.

The Prayer of the Petition is (1) that a hearing be held and that the Court shall enter a finding that an escheat has occurred of said unclaimed moneys, except—

> (a) such moneys as shall appear at the said hearing to have been claimed by or paid to persons lawfully entitled thereto between the filing of this petition and the date of the said hearing;
>
> (b) such moneys as may be claimed at the said hearing by persons lawfully entitled thereto.

and (2) that this court shall make an Order empowering and directing that the Treasurer of the United States pay the said moneys to Philip Klein for and on behalf of the Commonwealth of Pennsylvania.

The United States Attorney for the Eastern District of Pennsylvania filed a Motion to dismiss. The matter came up for hearing, and on February 21, 1935, we entered an Order refusing the Prayer of the Petition. Subsequently, on the representation of counsel that additional legislation was pending at Harrisburg, we allowed a Rule for a reargument, which is the matter now before us. Counsel was apparently of the opinion that the Petition was discharged for purely procedural reasons, but this was not the case. The difficulty is fundamental. We might discuss the principle of escheat, procedure, and sovereignty at great length, but this would serve no useful purpose. Our objections are

definite and fundamental and can be very briefly stated.

In the first place, the money in question is in the Treasury of the United States. There is no Act of Assembly which provides for the escheat of such moneys to the Commonwealth of Pennsylvania.

In the second place, if such an Act were in existence, it would be invalid. The right to take property by escheat is inherent in every sovereign, but is limited to property within the domain of that sovereign. Pennsylvania is a sovereign state, but so is the United States of America. When money is in the Treasury of the United States, it is within the domain of the United States of America and cannot be escheated to the Commonwealth of Pennsylvania.

In the third place, if this be regarded as an action to escheat moneys under the control of the United States District Court, any enabling legislation is void, because the United States District Court was created by an Act of Congress, and can be controlled only by Congress. The State of Pennsylvania is powerless to control or direct the actions of a District Court of the United States, even though that District Court be within the geographical bounds of the State of Pennsylvania.

For the above reasons, this Petition cannot prevail. It probably would have been better to have sustained the Motion to dismiss, rather than to have discharged the Petition, but the effect is the same.

And now, to wit, this 18th day of July 1935, the Rule for a reargument is discharged.

By the Court:

(SGD.) LAMBERTON, *J.*

Opinion sur motion to dismiss

ALESSANDRONI, *J.*:

This matter has been previously before us, and was disposed of in an opinion by Lamberton, J., filed July 18, 1935. In that opinion the facts were fully stated and need not here be repeated. Subsequently, on the representation of counsel for the Petitioner that new facts had been discovered, leave was granted to file an Amended Petition, and this was accordingly done. The United States Attorney has again filed a Motion to Dismiss.

The original Petition for escheat recited that the moneys had been "deposited in the custody of the Treasury of the United States." The Amended Petition repeats this averment, but amplifies it by stating "such deposit being made by a bookkeeping entry in the Federal Reserve Bank in the City of Philadelphia, transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania to the account of the Treasury of the United States." This is the only change of any substance made by the Amended Petition.

We do not believe the Amended Petition improves the position of the Petitioner. It avers that the transfer of the money was by a bookkeeping entry. In these days of banking facilities, it is seldom that a transfer is made in any other way, and a transfer so made is just as complete and effectual as if gold coin (there being such in the year when this transfer was made) were bodily shipped from one place to another. Therefore, the three reasons given in the opinion of Judge Lam-

berton still preclude Petitioner from maintaining this action. Even if transfer by bookkeeping entry be considered no transfer at all, which is unthinkable, the third reason given by Judge Lamberton would still present an insuperable barrier to the maintenance of this action.

And now, to wit, this 21st day of January 1936, the Motion of Charles D. McAvoy, United States Attorney, to dismiss the Petition in the above case is granted.

By the Court:

(Sgd.) ALESSANDRONI, *J.*

Decree of escheat

And now, to wit, this 1st day of October 1936, this cause having come on before the Court, for hearing on Amended Petition for Escheat of certain moneys, and upon the answer thereto of the United States of America, and all other proceedings, and after hearing duly had, upon notice duly given, in accordance with the order of the Court to all parties in interest,

It Is Ordered and Decreed that—

Whereas, in the matter of *Alice Frances Brown et al.* v. *Pennsylvania Canal Company et al.*, No. 677 in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

Whereas thereafter, on June 26, 1926, these moneys were deposited to the credit of the Treasury of the United States, subject to

the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 is Hereby Declared Escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court:

(Sgd.) FRANK SMITH, *J.*

Final decree

And now, to wit, this 8th day of January 1937, this cause having come on before the Court for rehearing on Petition of the United States Attorney, and after rehearing duly had,

It Is Ordered that the decree entered by this Court on October 1, 1936, be reaffirmed as follows:

It Is Ordered and Decreed that—

Whereas, in the matter of *Alice Frances Brown et al.* v. *Pennsylvania Canal Com-*

pany et al., No. 677 in equity, of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and

Whereas thereafter, on June 26, 1936, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 Is Hereby Declared Escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court:

ALESSANDRONI, *J.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

PHILIP KLEIN, ESCHEATOR OF THE COMMONWEALTH OF PENNSYLVANIA

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

STATUTES INVOLVED

The Federal and state statutes involved are set forth in the Appendix, *infra*, pp. 12–22.

STATEMENT

By decree filed Dec. 19, 1918, in the case of *Brown* v. *Pennsylvania Canal Co.*, No. 677, April Session, 1911, U. S. D. C., E. D. Pa., it was ordered that the unclaimed balance of certain sums adjudged to be owing to bondholders of the Pennsylvania Canal Co. be paid into court. In accord-

ance with the provisions of R. S., Sections 995 and 996 (*infra*, Appendix, pp. 19–20), the moneys so paid into court were first deposited in a designated depositary of the United States, in the name and to the credit of the court, and thereafter deposited in the Treasury of the United States, in the name and to the credit of the United States.

On April 17, 1934, the Commonwealth of Pennsylvania, by Philip Klein, Escheator, filed a petition in the United States District Court for the Eastern District of Pennsylvania praying that the court declare an escheat of the moneys above described and order payment to the Commonwealth of Pennsylvania. Upon notice of the presentation of the petition the United States District Attorney filed an objection to the jurisdiction of the District Court. The petition was dismissed without prejudice on the ground that the District Court had no jurisdiction to declare an escheat of the moneys.

Thereafter the instant proceeding was begun by petition of Philip Klein, Escheator, appellee herein, filed in the Court of Common Pleas No. 5 of Philadelphia County. The petition prayed that an escheat be declared under state statutes of the unclaimed moneys in the case of *Brown* v. *Pennsylvania Canal Company*. The United States of America, by the United States Attorney for the Eastern District of Pennsylvania, appeared specially and moved to dismiss the petition for lack of jurisdiction on the grounds that the state statutes

were void in so far as they attempted to escheat moneys in the custody of the United States or its court, and that the funds sought to be escheated, since they were in the Treasury of the United States, were not within the jurisdiction of the courts of Pennsylvania.

On February 21, 1935, an order was entered, refusing the prayer and the petition. Thereafter the state escheat statutes relied on by the escheator as establishing the jurisdiction of the Court of Common Pleas were amended by the acts of May 16, 1935, and June 28, 1935. On July 18, 1935, the Court of Common Pleas, in effect, dismissed the petition. The escheator appealed to the Supreme Court of Pennsylvania, which court on June 26, 1936, filed an opinion which held the state escheat statutes as amended to be constitutional, reversed the judgment of the lower court, and remanded the case for further proceedings.

The United States on October 1, 1936, filed an answer in which it was alleged that the state statute authorizing the escheat of the moneys in question is unconstitutional as an unlawful interference with the Federal courts and is an attempt to take jurisdiction over a matter outside the State's lawful jurisdiction. The case was tried in the Court of Common Pleas and a decree of escheat of the moneys in question to the Commonwealth of Pennsylvania was entered on Oct. 1, 1936. The decree of escheat reads as follows:

It Is Ordered and Decreed that

Whereas, in the matter of *Alice Frances Brown et al.* v. *Pennsylvania Canal Company et al.*, No. 677 in equity of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919 and

Whereas, thereafter on June 26, 1926, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the aforementioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 is Hereby Declared Escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator

of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

On petition of the United States a rehearing was granted, and the decree of escheat entered on Oct. 1, 1936 was confirmed in all respects on Jan. 8, 1937. The United States appealed to the Supreme Court of Pennsylvania and raised the question of the unconstitutionality of the state statute by appropriate assignment of errors. On May 17, 1936, the Supreme Court of Pennsylvania affirmed the decree of escheat entered by the Court of Common Pleas. The United States duly perfected an appeal to this Court from the judgment of affirmance by the Supreme Court of Pennsylvania.

ARGUMENT

By specific provisions of Federal statutes, R. S., Sections 995–996 and Section 17 of the Permanent Appropriation Repeal Act, 1934, *infra*, p. 21, the United States has in effect assumed the obligations of a trusteeship of unclaimed funds paid into the courts of the United States. Under these provisions, the United States makes no claim of beneficial ownership in such funds but acts on behalf of the persons rightfully entitled thereto. The appellee does not deny, and there can be little doubt of, the power and duty of the United States to make such appropriate provision for the care, and eventual return to persons entitled thereto, of funds paid into the courts of the United States.

Cf. *Mellon* v. *Orinoco Iron Co.*, 266 U. S. 121; *Houston* v. *Ormes*, 252 U. S. 469; *Sprunt* v. *Direction Der Disconto Gesellschaft*, 63 F. (2d) 127 (App. D. C.).

The United States contends that the state escheat statutes under which the judgment of the court below was reached are unconstitutional because they interfere with the functioning of the United States District Court and the Federal Treasury in the effectuation of the policy of trusteeship adopted by the United States. Appellee urges (1) that the Federal question thus presented is not substantial, (2) that the United States has not such an interest as to entitle it to raise the question, and (3) that the judgment below lacks the completeness requisite for an appeal. Each of these contentions is, we submit, unsound.

1. Under R. S., Section 996 any person entitled to the moneys here in question may apply to the District Court for the Eastern District of Pennsylvania for an order directing payment. Notice of the application must be given to the United States Attorney and full proof of right to the moneys must be made. If such order is obtained, payment will be made out of the trust fund receipt account in the Treasury designated "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." Section 17 of the Permanent Appropriation Repeal Act, 1934, *infra*, p. 21. There is no limitation of time upon the right of claimants

to the moneys to apply to the District Court for payment. Under the state statutes here asserted to be unconstitutional, the unclaimed moneys now in the trust fund of the Federal Treasury were escheated to the Commonwealth of Pennsylvania upon the only showing required by those statutes, that the original owners of the moneys have been unknown for a period of seven years and more. Whereas under the Federal statutes the right of the original owners to present their claims to the United States District Court is without time limit, under the state statutes that right may in effect be obliterated by proceedings in the state courts after passage of but seven years.

In *First Nat'l Bank* v. *California*, 262 U. S. 366, this Court held that a state statute providing for escheat to the State of bank deposits unclaimed for more than twenty years was invalid as applied to deposits in national banks. This Court reasoned (p. 370):

> If California may thus interfere other States may do likewise; and, instead of twenty years, varying limitations may be prescribed—three years perhaps, or five, or ten, or fifteen. We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the

commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries; and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

This Court has often pointed out the necessity for protecting federal agencies against interference by state legislation. The approved principle of *obsta principiis* should be adhered to.

So here unless the relevant provisions of the state statutes are held invalid, funds paid into the courts of the United States may be subject under varying limitations of years to seizure wherever the court happened to be located. Here the policy of Congress is more explicit than in the *California* case, *supra*. The intent to establish a trusteeship of funds paid into Federal courts on behalf of those entitled thereto and without limitation upon their rights is manifest in the Federal statutes. Certainly the unhampered and successful operation of its courts is no less important to the Federal Government than the successful operation of national banks. Under the principles enunciated by the Court in *First Nat'l Bank* v. *California, supra*, the provisions of the state satutes here involved appear to be invalid.

Appellee cites no decisions which foreclose the contention of the United States. Clearly the Federal question presented by the appeal is substantial, and does not warrant summary disposition upon motion to dismiss or affirm.

2. The interest of the United States to contest the validity of the state statutes is no less than that of the bank in *First Nat'l Bank* v. *California, supra.* There, as here, no beneficial interest in the funds could be claimed by the contestant. Assuming the power of the United States to establish the trusteeship of the moneys now declared by the court below to be escheated to the Commonwealth of Pennsylvania, it would seem to follow that the United States may take appropriate steps to protect that trusteeship. The interest of the United States here is not simply the general interest of the sovereign in the enforcement of its laws, but is the interest of a trustee of specific funds the title to which is drawn in question. It is no answer to urge that the decree affirmed below did not order payment to the Commonwealth out of the United States Treasury but merely directed the appellee to apply to the District Court for an order of payment. It can not be assumed that the District Court will not order payment to the escheator. That court will, it is true, have before it also a question of the construction of the Federal statutes, but the United States may well be barred by principles of *res adjudicata* from urging the invalidity of the state statutes and of the decree of escheat

entered thereunder. Apart from the question whether, since there was no seizure of the *res* (the moneys on deposit in the Federal treasury), the decree of escheat would be effective as against the original owners, see *Security Bank* v. *California*, 263 U. S. 282, 287; *Hamilton* v. *Brown*, 161 U. S. 256, 274, it remains true that the decree may operate *in personam* so as to bind the United States. See *Security Bank* v. *California*, *supra*, at p. 287. Apparently such was the conception which the court below took of its judgment. See *In re Escheat of Moneys in Custody of United States Treasury*, 322 Pa. 481, 485. Under these circumstances, the interest of the United States in its capacity as trustee of the funds in question is presently prejudiced by the judgment of the court below. See *United States* v. *Knott*, 298 U. S. 544, 551. Cf. *Boston & Albany Railroad* v. *O'Reilly*, 158 U. S. 334, 337.

3. There is no merit in appellee's contention that the judgment of the court below is not reviewable for the reason that it does not constitute "a complete disposition of the subject matter." (Appellee's Statement of Grounds Making Against Jurisdiction, p. 6.) Appellee admits, as he must, that the judgment of the Supreme Court of Pennsylvania sought to be reviewed was final, but urges that no complete disposition of the subject matter will be had until the appellee makes application to the District Court for payment, and the District Court

denies or grants such application. As has been pointed out *supra*, p. 10, the "judgment * * * prejudices [the] right" of the United States. See *United States* v. *Knott*, 298 U. S. 544, 551.

There is in appellant's argument a patent confusion of two separate controversies, that here presented which began in the state courts and has been finally decided, and that controversy which may eventually take place in the District Court if the escheator makes application there for payment. There can be no question that all the elements of the present controversy have been decided as to all the parties by the court below. That is all that is needed to make the final judgment of the court below complete. Cf. *Arnold* v. *Guimarin & Co.*, 263 U. S. 427; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 101; *Cotton* v. *Hawaii*, 211 U. S. 162, 170, 171.

CONCLUSION

For the reasons stated we respectfully submit that the motion to dismiss or affirm should be denied.

STANLEY REED,
Solicitor General.
SAM E. WHITAKER,
Assistant Attorney General.
JOSEPH A. FANELLI,
Attorney.

SEPTEMBER 1937.

APPENDIX

The Pennsylvania escheat statutes as amended, Purdon's Pennsylvania Statutes, Title 27, Secs. 41, 45, 283, and 334, are as follows:

SEC. 45. Every court having jurisdiction in cases of escheat shall, after the determination of each and every case, file of record a finding or adjudication, which shall set forth:

I. Whether an escheat hath occurred or not.

II. In what manner and for what cause the said escheat hath occurred, with the full name of the intestate, if any there be, or of the person who was last seized or possessed of the property in question.

III. What estate, real or personal, hath escheated, and what is the value thereof.

IV. Where said estate, real or personal, is situated, and in whose possession the same then is.

And in case the said court shall find that any property, real or personal, hath escheated, the same shall be awarded to the escheator for and on behalf of the commonwealth. (1889, May 2, P. L. 66, Sec. 10.)

SEC. 41. That the jurisdiction in all cases of escheat under the provisions of this act, shall be vested in the courts of this Commonwealth, as follows, namely:

Whenever an escheat shall occur, or be supposed to occur, by reason of any person dying intestate, without heirs or known kindred, a widow or surviving husband, the orphans' court of the county wherein said

decedent was resident at the time of his death, or, in case said decedent was not at the time of his death resident within this Commonwealth, then the orphans' court of the county in which the greater part of his property, real and personal, shall be situate, shall have jurisdiction.

Whenever an escheat shall occur, or be supposed to occur, of any property, estate, or effects deposited in the custody of any court, or with any depository, receiver, or other officer thereof, the owner whereof shall be unknown, and whenever any escheat shall occur or be supposed to occur of any property, estate, or effects held by any trustee or other person in a fiduciary capacity, who shall have filed an account thereof in any court of this Commonwealth, by reason of the fact that the cestui que trust or beneficial owner thereof shall be unknown, then, and in such case, the court in which, or in the custody of any depository, receiver, or other officer of which, said property, estate, or effects may have been or shall be deposited, whether the same be real or personal, or in which said account has been or may be duly filed, shall have jurisdiction; and whensoever any property, estate, or effects held by any trustee or trustees under any trust, or held by and resulting to such trustee or trustees from the exercise of the trust, or resulting after the termination of the trust and before distribution is actually made under the terms of the trust or decree of court, from rents, accretions, profits, or interest from, of, or on the trust property, or any part thereof, shall escheat or be supposed to escheat by reason of the fact that such property, estate, or effects has no lawful owner, the court of common pleas of the county in

which such property, estate, or effects, or the greater part thereof, shall be located, shall have jurisdiction, except in cases where the trustee shall be a corporation, in which cases the court of common pleas of the county wherein the principal office of such corporation is located shall have jurisdiction.

Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth. (As amended 1935, June 28, P. L. 475, Sec. 2.)

SEC. 282. After any particular deposit of money, made with every person, copartnership, bank, national bank, safe deposit company, trust company, association, and corporation, and savings fund, savings institution, and savings bank, shall not have been increased or decreased, or if not increased or decreased, shall not be known to have been credited with interest, on the passbook or certificate of deposit of the depositor at his request, for the period of ten successive years in all cases, except savings funds, savings institutions, and savings banks, and in the case of savings funds, savings institutions, and savings banks shall not have been so increased, decreased, or credited for a period of twenty-one years, the same shall be escheatable to the Commonwealth, and shall be escheated in the

manner hereinafter provided, with interest thereon actually accrued to the date of the decree for the escheat of the same, whether such deposit was, at the expiration of said period, in the possession of the depositary with which it was originally deposited, or in the possession of another depositary which took over mediately or immediately, in any manner, whether before or after the expiration of said period of ten years or twenty-one years, as the case may be, the deposits of the depositary with which the deposits was originally made.

After the owner, beneficial owner, or person entitled to any of the following named moneys or property, shall be and remain unknown, or the whereabouts thereof shall have been unknown, for the period of seven successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same, namely:

(a) Moneys or other estate of any kind whatsoever held by any person, bank, national bank, trust company, or other association, or corporation, as guardian, committee, executor, administrator, assignee, or receiver, or as trustee under or by reason of a dry trust or under or by reason of any other trust the active duties of which have terminated except the delivery or payment to the beneficiaries thereunder of the subject of the trust, and any increments accrued thereon.

(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal court in and

for any district within the Commonwealth, or in the custody of any officer of any such court.

After any moneys or property held by any person, bank, national bank, trust company, or other corporation, or by any association, limited partnership, or copartnership, belonging to any other person, the escheat of which is not otherwise provided for in this section, has been and remained unclaimed, by the person for whom the same is held, for the period of seven or more successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

After any dividend or dividends, profit or profits, declared by any bank, national bank, trust company, or other corporation, or association, or by any partnership, and after any debt or interest on any debt or debts owed by any such bank, national bank, trust company, or corporation, association, or copartnership, shall have been and remained due and unpaid for three successive years, such dividends or profits, debt or interest on debt, shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

Such escheat shall, at the suggestion of the Auditor General, be determined and enforced by an action in the nature of a bill in equity, filed by and in the name of the Attorney General, against the depositary, fiduciary, or debtor, and all of his or its depositors, beneficiaries, or creditors for whom he or it holds unclaimed moneys escheatable

under the provisions of this act, in the appropriate court for the county where the debtor, if an individual, resides, or, if a corporation, where it maintains its principal office. Such action shall be brought in the court of common pleas, except: (a) Where it is sought to escheat unclaimed trust funds, in which case the same shall be brought in the court having jurisdiction of such funds; and except (b) where it is sought to escheat moneys paid into or deposited in a court or in the custody of any officer thereof, in which case such action shall be brought in the court into which the money was paid, or in which it was deposited, or in the custody of an officer of which court the said moneys are.

When the moneys have been paid into and are in the custody of any court, the escheat of the same shall be determined and enforced, at the suggestion of Auditor General, by a petition filed by the Attorney General in said court, upon which proceedings shall be had as in other cases of escheat provided for by this section. Proceedings for the escheat of moneys in the possession or custody of any officer of any court shall be by a bill as provided for by this section in other cases, in which bill such officer and the persons entitled to such moneys shall be made codefendants.

Any such escheat proceedings may be prosecuted whether the deposits, dividends, moneys, funds, or other property or estate sought to be escheated, shall have been reported to the Auditor General in conformity with the provisions of this act or have not been so reported. Any number of items may be joined in one action against one debtor, though owed to different creditors.

If service of the bill can not be had on the creditors defendant within the State, service shall be made by publication for two successive weeks, in a newspaper of general circulation, published in the county in which the debtor is resident or has its principal office, and also, when practicable, for the same period, in such a newspaper published in the county, within or without the Commonwealth, where, when last heard from by the debtor, the creditor had his residence. Publication may be made in such form as the court shall direct, and need not contain any order or other paper in full.

If such creditors or their legal representatives shall appear in the cause within the time limited by the court, and establish their right to recover said sums from the debtor but for the provisions of this act, and if this right shall not be barred by the statute of limitations or presumption of payment, a decree shall be made for the payment of said sums to them after paying their proportionate part of the costs of the cause and of said advertising: *Provided,* That such persons, on demand, may have any issue of fact determined by a jury; and if they shall not so appear and establish such right, a decree shall be made that said sums have escheated and shall be paid by the debtor to the State Treasurer for the use of the Commonwealth; and the amount of such decree shall bear interest at the rate of twelve per centum per year from sixty days after the same is made; and such decree shall be effectual to bar the creditors from claiming the said sums from the debtor. An appeal may be taken, by either or any party to such action, to the Supreme Court, at any time within thirty days after the date of the decree issued therein.

An action may be begun, in the nature of a bill for discovery merely with respect to the subject matter of this act, whether in this or other sections hereof, against the debtor, without the necessity of specifying the items which should escheat, with the right to compel an answer under oath, to subpoena all persons as witnesses, and to compel the production of all books, papers, and records; and from time to time the bill may be amended to pray for the escheat of specific items under this section seven, and to make parties to the bill the creditors as ascertained. (As amended 1935, May 16, P. L. 195, Sec. 1.)

* * * * *

SEC. 334. That whensoever any money, estate or effects, shall have been, or shall hereafter be paid into or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk, or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same. (As amended 1935, June 28, P. L. 475, Sec. 1.)

R. S., Sec. 995, as amended; U. S. C., Title 28, Sec. 851, provides—

Moneys paid into court; deposit.—All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the

Treasurer, or a designated depositary of the United States, in the name and to the credit of such court. Nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

R. S., Sec. 996, as amended; U. S. C., Title 28, Sec. 852, provides—

Same; withdrawal.—No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States. Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders.

The Permanent Appropriation Repeal Act, June 26, 1934, c. 756, 48 Stat. 1224, 1230, Sec. 17, provides—

> (a) Effective July 1, 1935, the appropriation accounts appearing on the books of the Government and listed in subsection (b) of this section, as well as appropriation accounts bearing similar titles on the books of the Government, are abolished, and any unobligated balances under such accounts as of June 30, 1935, shall be covered into a trust fund receipt account in the Treasury to be designated "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." Any appropriations to which expenditures under such accounts have been chargeable theretofore are hereby repealed. There are authorized to be appropriated, annually, from such account such sums as may be necessary to meet any expenditures of the character now chargeable to the appropriation accounts abolished by this section. The Secretary of the Treasury or the Commissioners of the District of Columbia, as the case may be, shall submit with their annual estimates of appropriations an amount necessary to meet expenditures properly chargeable to this account.
>
> (b) (1) Unclaimed moneys, Food Administration.
>
> (2) Unclaimed moneys of individuals whose whereabouts are unknown (Veterans' Administration).
>
> (3) Unclaimed moneys of former patients, Veterans' Administration hospital.
>
> (4) Unclaimed moneys of individuals whose whereabouts are unknown (relief of American citizens in Europe).

(5) Unclaimed moneys of individuals whose whereabouts are unknown (Interior, civil).

(6) Unclaimed moneys of individuals whose whereabouts are unknown (Justice).

(7) Unclaimed moneys of individuals whose whereabouts are unknown (Labor).

(8) Unclaimed moneys of individuals whose whereabouts are unknown (Navy).

(9) Unclaimed moneys of individuals whose whereabouts are unknown (State).

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

PHILIP KLEIN, ESCHEATOR OF THE COMMONWEALTH OF PENNSYLVANIA

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The Court of Common Pleas of Pennsylvania (R. 7–9) entered an opinion which is not reported. The original opinion of the Supreme Court of Pennsylvania (R. 14–17) is reported in 322 Pa. 481. The subsequent opinion of the Supreme Court of Pennsylvania (R. 39–40) is reported in 326 Pa. 260.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered May 17, 1937 (R. 39–40). The petition for appeal was filed (R. 40–41) and al-

lowed (R. 42) on August 14, 1937. The jurisdiction of this Court to review the judgment complained of is conferred by Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Probable jurisdiction was noted by this Court on October 11, 1937. Consideration of the motion to dismiss or affirm was postponed to the hearing on the merits.

QUESTION PRESENTED

Whether a state statute is void in so far as it attempts to confer jurisdiction on a state court to determine and find the fact of escheat of moneys deposited in the registry of a Federal district court in that State, which moneys are presently in the Treasury of the United States, held by the United States for the purpose for which they were paid and also held subject to the control of the Federal court pursuant to an Act of Congress.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 17–27.

STATEMENT

By decree filed December 19, 1918, in the case of *Brown* v. *Pennsylvania Canal Co.*, No. 677, April Session, 1911, United States District Court, Eastern District of Pennsylvania, it was ordered that the unclaimed balance of certain sums adjudged to be owing to bondholders of the Pennsylvania Canal Company be paid into court (R. 27–28). In ac-

cordance with the provisions of Revised Statutes, Sections 995 and 996, as amended, *infra,* pp. 24–25, the moneys so paid into court were first deposited in a designated depositary of the United States, in the name and to the credit of the court, and thereafter deposited in the Treasury of the United States, in the name and to the credit of the United States (R. 22–23, 25, 32, 37–38).

On April 17, 1934, the Commonwealth of Pennsylvania, by Philip Klein, Escheator, filed a petition in the United States District Court for the Eastern District of Pennsylvania, praying that that court declare an escheat of these moneys, and order payment to the Commonwealth of Pennsylvania (R. 4, 11–12). Upon notice of the presentation of the petition, the United States Attorney filed an objection to the jurisdiction of the District Court. The petition was dismissed without prejudice on the ground that the District Court had no jurisdiction to declare an escheat of the moneys. (R. 4, 5, 15.)

Thereafter, the instant proceeding was begun by petition of Philip Klein, Escheator, appellee herein, filed in the Court of Common Pleas No. 5 of Philadelphia County. The petition prayed that an escheat be declared under state statutes of the unclaimed moneys in the case of *Brown* v. *Pennsylvania Canal Company, supra.* (R. 2–6.) The United States of America, by the United States Attorney for the Eastern District of Pennsylvania,

appeared specially and moved to dismiss the petition for lack of jurisdiction on the grounds that the state statutes were void in so far as they attempted to escheat moneys in the custody of the United States or its court, and that the funds sought to be escheated, since they were in the Treasury of the United States, were not within the jurisdiction of the courts of Pennsylvania (R. 7).

On February 21, 1935, an order was entered, refusing the prayer and the petition (R. 7). Thereafter the state escheat statutes, relied upon by the escheator as establishing the jurisdiction of the Court of Common Pleas, were amended by the acts of May 16, 1935, and June 28, 1935, to give a state court jurisdiction to decree an escheat of moneys in the registry of United States courts or of unclaimed moneys transferred to the Treasury of the United States in accordance with Section 996 of the Revised Statutes (R. 11, 12). On July 18, 1935, the Court of Common Pleas, in effect, dismissed the petition (R. 13–14). The escheator appealed to the Supreme Court of Pennsylvania. That court, on June 26, 1936, held the state escheat statutes, as amended, to be constitutional, reversed the judgment of the lower court, and remanded the case for further proceedings (R. 14–17).

The United States filed an answer in which it was alleged that the state statute authorizing the escheat of the moneys in question is unconstitutional, as an unlawful interference with the

Federal courts, and as an attempt to take jurisdiction over a matter outside the State's lawful jurisdiction (R. 18–20). The case was tried in the Court of Common Pleas, and a decree of escheat of the moneys in question to the Commonwealth of Pennsylvania was entered on October 1, 1936 (R. 32–33). That decree was reaffirmed and a final decree entered in the Court of Common Pleas on January 8, 1937 (R. 34). Exception by the United States to the decree of January 8, 1937, was entered and allowed on February 3, 1937 (R. 34–35). On appeal the Supreme Court of Pennsylvania affirmed the decree of escheat (R. 39–40).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Pennsylvania erred:

1. In holding that the escheat laws of the State of Pennsylvania, as amended by the acts of May 16, 1935, and June 28, 1935, providing for the escheat of moneys or property deposited in the custody or under the control of any court of the United States in and for any district within the State of Pennsylvania was constitutional.

2. In failing to hold that such laws were unconstitutional because they constituted an interference with courts of the United States.

3. In failing to hold that the acts were unconstitutional because they constituted an unwarranted infringement on the sovereign power of the United States of America.

4. In failing to hold that the acts constituted an unlawful attempt to exercise sovereignty outside the jurisdiction of the State of Pennsylvania contrary to the Fourteenth Amendment to the Constitution of the United States.

5. In holding that the acts conferred jurisdiction to escheat moneys in the Treasury of the United States.

6. In affirming the judgment and decree of the Court of Common Pleas No. 5, Philadelphia County.

SUMMARY OF ARGUMENT

1. The Constitution conferred upon the Congress the power to set up a court such as the United States District Court for the Eastern District of Pennsylvania. That court had authority to exercise jurisdiction in a case of the nature of *Brown* v. *Pennsylvania Canal Company*, wherein certain funds were ordered paid into the registry of the court for the benefit of the persons on whose behalf the suit was brought. Later, by authority of Section 996 of the Revised Statutes, that money was paid into the Treasury of the United States. There it is still held for the benefit of certain bondholders whose whereabouts are, at the present time, unknown, to be paid out to them under proper order of the court. The statute of Pennsylvania authorizing a court of that State to decree an escheat of moneys held either in the registry of a United States court or transmitted by such court to the

Treasury of the United States, is an invasion of the sovereignty of the United States, and as such is unconstitutional and void.

A court first acquiring jurisdiction of a matter retains jurisdiction to the exclusion of courts of concurrent jurisdiction. Here the United States District Court has jurisdiction of the *res*, and a state court can not interfere therewith. Any interference on the part of a State with a Federal instrumentality, unless specifically authorized by Congress, is unconstitutional; and an interference with Federal courts is even less permissible. We submit that the action of the State of Pennsylvania in attempting to interfere with the proper functioning of a Federal court is unconstitutional.

2. An action of escheat is an action *in rem*. Admittedly, the state court had no jurisdiction of the *res*. The Supreme Court of Pennsylvania asserted that jurisdiction *in personam* had been obtained by publication, but the record fails to disclose that any of the unknown bondholders were or ever have been residents of Pennsylvania. Service by publication, therefore, could not possibly affect their rights. Neither does there exist a debt owing by the Pennsylvania Railroad Company. That debt has long since been discharged. The situs of the debt is not within the sovereignty of the State of Pennsylvania. In *Cunnius* v. *Reading School District*, 198 U. S. 458, relied upon by the court below, the debt had a situs in the State. The concept of

situs depends upon power and control, and if that power and control be lacking, a debt may not be said to have a situs in a State. The courts of Pennsylvania, therefore, having no jurisdiction either *in rem* or *in personam*, and the debt having no situs in Pennsylvania, there was an absence of jurisdiction to decree an escheat.

ARGUMENT

I

THE PENNSYLVANIA ESCHEAT STATUTE, AS APPLIED, CONSTITUTES AN UNCONSTITUTIONAL INTERFERENCE WITH THE FEDERAL COURTS

In the case of *Brown* v. *Pennsylvania Canal Co. et al*, instituted in the year 1911 in the United States District Court for the Eastern District of Pennsylvania, the Pennsylvania Railroad Company was required to pay to the trustee for the bondholders of the Pennsylvania Canal Company the sum of $1,379,941.28, which the railroad company had diverted, together with interest thereon from July 1, 1910 (R. 29). After all known bondholders had filed their claims and received their pro rata share, there still remained a balance of several thousand dollars, to which certain unknown bondholders were entitled. First, the known bondholders sought a decree directing that this balance be prorated among them. The petition was denied, the court holding that the money was the property of the unknown bondholders whenever they should

come in and prove their claims (R. 28). Theretofore the trustee had been directed to pay the money into the registry of the court (R. 27). After the lapse of five years, the balance of $18,650.75, on June 26, 1926, was covered into the Treasury of the United States (R. 25) pursuant to Section 996 of the Revised Statutes, *infra*, p. 25, but it was still available for the payment of claims,[1] for that section provides that where money, formerly in the registry of a court, has been paid into the Treasury of the United States, any person, corporation, or company entitled to such money, on petition to the court and full proof of right thereto, may obtain an order of court directing the payment of such money to it. No time limit has ever been placed on the proof of claims by the District Court (274 Fed. 467, 469). Under the orders of the United States District Court, therefore, and under the statutes the unknown bondholders are still entitled to prove their claims and obtain payment thereof.

The escheat statutes of the State of Pennsylvania, *infra*, pp. 17–24, on the contrary, provide for an escheat to that State of such moneys as have been unclaimed for seven years, and the state courts have decreed that such an escheat has here taken place. If such decree be effective, it deprives the bondholders of the right given them by the statutes of

[1] On March 30, 1936, the District Court entered a decree allowing payment to a bondholder who had made claim therefor in 1935 (R. 25).

the United States and the decree of the United States District Court, now or later to prove their claims and to receive their pro rata share of the sum remaining on deposit in the Treasury of the United States.

The issue presented, therefore, is whether a State has power to void or to impair the effect, not only of a decree of a court of the United States, but also of statutes of the United States. The answer to this question, manifestly, is no, as the Federal court admittedly had jurisdiction of the subject-matter and of the parties, and the statutes had reference to a matter within the jurisdiction of the Congress.

A State, of course, possesses full powers of a sovereign within its territorial confines, except over matters as to which it has surrendered or delegated sovereignty to the United States; but that delegation, once made, is complete and paramount, and can not be limited or in any way impaired by the exercise of the sovereign powers otherwise reserved to the States. *McCulloch* v. *Maryland,* 4 Wheat. 316, 405, 429, 436; *Tarble's Case,* 13 Wall. 397, 406; *Claflin* v. *Houseman, Assignee,* 93 U. S. 130, 136–137.

Among the powers delegated to the Federal Government was jurisdiction to try and determine in its courts cases of the character of *Brown* v. *Pennsylvania Canal Co. et al., supra.* Such jurisdiction is plenary, and, of course, includes complete and

untrammeled control over the disposition of funds paid into court in pursuance of its decrees, subject to such regulation as the Congress may from time to time prescribe. *Tennessee* v. *Davis*, 100 U. S. 257, 263, 266; *Martin* v. *Hunter*, 1 Wheat. 304, 337, 363.

The Congress has provided for a registry in which such funds are to be deposited, and likewise has provided that if unclaimed for a period of five years, they shall be transmitted to the Treasury of the United States and constitute a permanent appropriation for the payment of any judgment rendered in the action by the particular Federal court upon full proof, at any time, by any claimant, of right, title, and interest thereto. It follows that an attempt on the part of the State of Pennsylvania to declare an escheat of moneys in the custody of the United States, and for the disposition of which the Congress has provided, is an invasion of the sovereignty of the United States, and that a statute authorizing such an invasion is unconstitutional and void. *Harris* v. *Dennie*, 3 Pet. 292, 304–305.

This Court has many times declared that where a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the other courts as effectually as if the property had

been entirely removed to the territory of another sovereignty.[2]

Similarly, it has been held that a court having jurisdiction of a person or property may not be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with its custody or possession. *In re Johnson,* 167 U. S. 120, 124–125; *Tarble's Case,* 13 Wall. 397, 406.

Attempts of States and Territories to escheat funds on deposit with national banks have been held to be unconstitutional as constituting an interference with a Federal instrumentality. *First National Bank* v. *California,* 262 U. S. 366; *National City Bank of New York* v. *People of the Philippine Islands,* October Term, 1937, No. 35. *A fortiori,* an Act providing for the escheat of funds in the Treasury of the United States and under the control of the United States is unconstitutional. That is an interference not with an instrumentality, but with the sovereign itself. Particularly, an interference with custody and control of Federal courts over things concerning which they have jurisdiction, is forbidden. *Heidritter* v. *Elizabeth Oil-Cloth Co.,* 112 U. S. 294, 301–304; *McKay* v. *Kaly-*

[2] *Palmer* v. *Texas,* 212 U. S. 118, 125; *Murphy* v. *John Hofman Co.,* 211 U. S. 562, 568–569; *Wabash R. R.* v. *Adelbert College,* 208 U. S. 38, 54; *Farmers Loan Co.* v. *Lake St. Rd. Co.,* 177 U. S. 51, 61; *Moran* v. *Sturges,* 154 U. S. 256, 274.

ton, 204 U. S. 458, 469; *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 609, 611.

We respectfully submit, therefore, that the statute in question, in so far as it undertakes to escheat moneys in the custody of the United States, which is a statutory trustee in respect of the fund in question [*United States* v. *Cochrane*, 87 F. (2d) 3, 4 (C. C. A. 5th); *Equitable Trust Co.* v. *Western Pac. Ry Co.*, 299 Fed. 304, 307 (N. D. Cal.); *Brown* v. *Pennsylvania Canal Co.*, 279 Fed. 417, 418 (C. C. A. 3d)], is unconstitutional and void because of its attempted interference.

II

THE STATUTE, AS APPLIED, VIOLATES THE FOURTEENTH AMENDMENT AS AN ATTEMPT TO CONTROL THE DISPOSITION OF A *res* OVER WHICH THE STATE HAS NO JURISDICTION

Under the sovereign powers reserved to the States, a State has the right to escheat property under such reasonable terms and conditions as it may impose; but this sovereign right, of course, extends only to such property as is within its dominion and control. It is impossible, therefore, for a State either to escheat or decree an escheat where it does not possess full power and control over either the person or property. *Commonwealth* v. *Thomas' Adm'r*, 140 Ky. 789, 795–796; *In re Lyons' Estate*, 175 Wash. 115, 118–120; cf. *In re Melrose Ave.*, 234 N. Y. 48.

An action of escheat is an action *in rem*. Woerner on Administration, 3d Ed., Sec. 133; *Hamilton* v. *Brown*, 161 U. S. 256, 274; *Security Bank* v. *California*, 263 U. S. 282, 286–287. Admittedly, the State of Pennsylvania had no control of the *res* in the instant case. *In the Matter of Escheat*, 322 Pa. 481. That *res* concededly is in the Treasury of the United States, not only outside of the sovereignty of Pennsylvania, but outside of its territorial confines. In order to avoid this difficulty, the Supreme Court of Pennsylvania undertook to hold that it had jurisdiction *in personam*, but obviously it can not be asserted that it has jurisdiction of the person, for the persons entitled to the fund are unknown, and therefore whether or not they are residents of Pennsylvania, or ever have been, is unknown. See *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, 400, 401. Nor can such jurisdiction be asserted on the theory that it is a debt owing to unknown persons by a resident of Pennsylvania, namely, the Pennsylvania Railroad Company. The debt owed by that company had long since been discharged by payment into court of the amount of the debt. Indeed, the railroad company sought to recover the remaining balance, but this was denied by the United States District Court in an unreported opinion (see Appendix, *infra*, p. 28), on the ground that the money was originally held by the Pennsylvania Railroad Company as trustee for the original bondholders, that each indi-

vidual bondholder owned his proportionate share of the money which the railroad company had been required to pay, and that the railroad company had no interest therein.

The decision of the Pennsylvania Supreme Court in the case at bar relies on the opinion of this Court in *Cunnius* v. *Reading School District*, 198 U. S. 458. That case has no application to the instant case, because there the debtor was a resident of and subject to the jurisdiction and control of the State. It is manifest that the distinction is fundamental between a debt of that character and one having a situs not only without the State and in the Federal Government, but one which also is by Act of Congress expressly subjected to the control of a Federal court. The elements that gave the debt a local situs within the jurisdiction of the State are absent in the instant case.

There was no property within the State under the facts of this case over which the State had jurisdiction and control. It is the element of control, and not the spatial quality of property which gives whatever significance there is to the legal concept, "situs." There is, therefore, no property whose "situs" is within the State, no property over which the State may exercise control. In other words, the State, not having power of control over the debt, that control being admittedly in the Federal court [*In the Matter of Escheat, supra*], there is no basis for jurisdiction for the state court. See

Carpenter "Jurisdiction over Debts, Etc.," 31 Harv. L. R. 905, 906-914.

Service was sought in this case by publication. The law is well settled that service by publication is absolutely ineffective to reach persons who are nonresidents of the State unless the property of such persons is within and has been subjected to the jurisdiction of the court.[1] It therefore appears that the decree of escheat which was undertaken in the instant case is an absolute nullity, because the court had no jurisdiction either *in rem* or *in personam*.

CONCLUSION

We respectfully submit that the judgment of the Supreme Court of Pennsylvania is incorrect and should be reversed.

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JANUARY 1938.

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[1] *Pennoyer* v. *Neff*, 95 U. S. 714; *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111; *Riverside Mills* v. *Menefee*, 237 U. S. 189; *N. Y. Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518; *Roller* v. *Holly*, 176 U. S. 398.

APPENDIX

The Pennsylvania escheat statutes as amended, Purdon's Pennsylvania Statutes, Title 27, Secs. 41, 45, 282, and 334, are as follows:

SEC. 45. Every court having jurisdiction in cases of escheat shall, after the determination of each and every case, file of record a finding or adjudication, which shall set forth:

I. Whether an escheat hath occurred or not.

II. In what manner and for what cause the said escheat hath occurred, with the full name of the intestate, if any there be, or of the person who was last seized or possessed of the property in question.

III. What estate, real or personal, hath escheated, and what is the value thereof.

IV. Where said estate, real or personal, is situated, and in whose possession the same then is.

And in case the said court shall find that any property, real or personal, hath escheated, the same shall be awarded to the escheator for and on behalf of the commonwealth (1889, May 2, P. L. 66, Sec. 10).

SEC. 41. That the jurisdiction in all cases of escheat under the provisions of this act, shall be vested in the courts of this Commonwealth, as follows, namely:

Whenever an escheat shall occur or be supposed to occur by reason of any person dying intestate, without heirs or known kindred, a widow or surviving husband, the orphans' court of the county wherein said

decedent was resident at the time of his death, or in case said decedent was not at the time of his death resident within this Commonwealth, then the orphans' court of the county in which the greater part of his property, real and personal, shall be situate, shall have jurisdiction.

Whenever an escheat shall occur, or be supposed to occur, of any property, estate or effects deposited in the custody of any court, or with any depository, receiver or other officer thereof, the owner whereof shall be unknown, and whenever any escheat shall occur or be supposed to occur of any property, estate or effects held by any trustee or other person in a fiduciary capacity, who shall have filed an account thereof in any court of this Commonwealth, by reason of the fact that the cestui que trust or beneficial owner thereof shall be unknown, then and in such case, the court in which, or in the custody of any depository, receiver or other officer of which said property, estate or effects may have been or shall be deposited, whether the same be real or personal, or in which said account has been or may be duly filed, shall have jurisdiction; and whensoever any property, estate, or effects held by any trustee or trustees under any trust, or held by and resulting to such trustee or trustees from the exercise of the trust, or resulting after the termination of the trust and before distribution is actually made under the terms of the trust or decree of court, from rents, accretions, profits, or interest from, of, or on the trust property, or any part thereof, shall escheat or be supposed to escheat by reason of the fact that such property, estate, or effects has no lawful owner, the court of common pleas of the

county in which such property, estate, or effects, or the greater part thereof, shall be located, shall have jurisdiction, except in cases where the trustee shall be a corporation, in which cases the court of common pleas of the county wherein the principal office of such corporation is located shall have jurisdiction.

Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth. (As amended 1935, June 28, P. L. 475, Sec. 2.)

SEC. 282. After any particular deposit of money, made with every person, copartnership, bank, national bank, safe deposit company, trust company, association, and corporation, and savings fund, savings institution, and savings bank, shall not have been increased or decreased, or if not increased or decreased, shall not be known to have been credited with interest, on the passbook or certificate of deposit of the depositor at his request, for the period of ten successive years in all cases, except savings funds, savings institutions, and savings banks, and in the case of savings funds, savings institutions, and savings banks shall not have been so increased, decreased, or credited for a period of twenty-one years, the same shall be escheatable to the Commonwealth, and shall

be escheated in the manner hereinafter provided, with interest thereon actually accrued to the date of the decree for the escheat of the same, whether such deposit was, at the expiration of said period, in the possession of the depositary with which it was originally deposited, or in the possession of another depositary which took over mediately or immediately, in any manner, whether before or after the expiration of said period of ten years or twenty-one years, as the case may be, the deposits of the depositary with which the deposit was originally made.

After the owner, beneficial owner, or person entitled to any of the following named moneys or property, shall be and remain unknown, or the whereabouts thereof shall have been unknown, for the period of seven successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same, namely:

(a) Moneys or other estate of any kind whatsoever held by any person, bank, national bank, trust company, or other association, or corporation, as guardian, committee, executor, administrator, assignee, or receiver, or as trustee under or by reason of a dry trust or under or by reason of any other trust the active duties of which have terminated except the delivery or payment to the beneficiaries thereunder of the subject of the trust, and any increments accrued thereon.

(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal court in and for any district within the Commonwealth,

or in the custody of any officer of any such court.

After any moneys or property held by any person, bank, national bank, trust company, or other corporation, or by any association, limited partnership, or copartnership, belonging to any other person, the escheat of which is not otherwise provided for in this section, has been and remained unclaimed, by the person for whom the same is held, for the period of seven or more successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

After any dividend or dividends, profit or profits, declared by any bank, national bank, trust company, or other corporation, or association, or by any partnership, and after any debt or interest on any debt or debts owed by any such bank, national bank, trust company, or corporation, association, or copartnership, shall have been and remained due and unpaid for three successive years, such dividends or profits, debt or interest on debt, shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same.

Such escheat shall, at the suggestion of the Auditor General, be determined and enforced by an action in the nature of a bill in equity, filed by and in the name of the Attorney General, against the depositary, fiduciary, or debtor, and all of his or its depositors, beneficiaries, or creditors for whom he or it holds unclaimed moneys escheatable under the provisions of this act, in the ap-

propriate court for the county where the debtor, if an individual, resides, or, if a corporation, where it maintains its principal office. Such action shall be brought in the court of common pleas, except: (a) Where it is sought to escheat unclaimed trust funds, in which case the same shall be brought in the court having jurisdiction of such funds; and except (b) where it is sought to escheat moneys paid into or deposited in a court or in the custody of any officer thereof, in which case such action shall be brought in the court into which the money was paid, or in which it was deposited, or in the custody of an officer of which court the said moneys are.

When the moneys have been paid into and are in the custody of any court, the escheat of the same shall be determined and enforced, at the suggestion of the Auditor General, by a petition filed by the Attorney General in said court, upon which proceedings shall be had as in other cases of escheat provided for by this section. Proceedings for the escheat of moneys in the possession or custody of any officer of any court shall be by a bill as provided for by this section in other cases, in which bill such officer and the persons entitled to such moneys shall be made codefendants.

Any such escheat proceedings may be prosecuted whether the deposits, dividends, moneys, funds, or other property or estate sought to be escheated, shall have been reported to the Auditor General in conformity with the provisions of this act or have not been so reported. Any number of items may be joined in one action against one debtor, though owed to different creditors.

If service of the bill can not be had on the creditors defendant within the State, service

shall be made by publication for two successive weeks, in a newspaper of general circulation, published in the county in which the debtor is resident or has its principal office, and also, when practicable, for the same period, in such a newspaper published in the county, within or without the Commonwealth, where, when last heard from by the debtor, the creditor had his residence. Publication may be made in such form as the court shall direct, and need not contain any order or other paper in full.

If such creditors or their legal representatives shall appear in the cause within the time limited by the court, and establish their right to recover said sums from the debtor but for the provisions of this act, and if this right shall not be barred by the statute of limitations or presumption of payment, a decree shall be made for the payment of said sums to them after paying their proportionate part of the costs of the cause and of said advertising: Provided, That such persons, on demand, may have any issue of fact determined by a jury; and if they shall not so appear and establish such right, a decree shall be made that said sums have escheated and shall be paid by the debtor to the State Treasurer for the use of the Commonwealth; and the amount of such decree shall bear interest at the rate of twelve per centum per year from sixty days after the same is made; and such decree shall be effectual to bar the creditors from claiming the said sums from the debtor. An appeal may be taken, by either or any party to such action, to the Supreme Court, at any time within thirty days after the date of the decree issued therein.

An action may be begun, in the nature of a bill for discovery merely with respect to the subject matter of this act, whether in this or other sections hereof, against the debtor, without the necessity of specifying the items which should escheat, with the right to compel an answer under oath, to subpoena all persons as witnesses, and to compel the production of all books, papers, and records; and from time to time the bill may be amended to pray for the escheat of specific items under this section seven, and to make parties to the bill the creditors as ascertained. (As amended 1935, May 16, P. L. 195, Sec. 1.)

* * * * * *

SEC. 334. That whensoever any money, estate or effects, shall have been, or shall hereafter be paid into, or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same. (As amended 1935, June 28, P. L. 475, Sec. 1.)

R. S., Sec. 995, as amended; U. S. C., Title 28, Sec. 851, provides—

Moneys paid into court; deposit.—All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such

court, shall be forthwith deposited with the Treasurer, or a designated depositary of the United States, in the name and to the credit of such court. Nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

R. S., Sec. 996, as amended; U. S. C., Title 28, Sec. 852, provides—

Same; withdrawal.—No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States. Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders.

The Permanent Appropriation Repeal Act, June 26, 1934, c. 756, 48 Stat. 1224, 1230, Sec. 17, provides—

(a) Effective July 1, 1935, the appropriation accounts appearing on the books of the Government and listed in subsection (b) of this section, as well as appropriation accounts bearing similar titles on the books of the Government, are abolished, and any unobligated balances under such accounts as of June 30, 1935, shall be covered into a trust fund receipt account in the Treasury to be designated "Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown." Any appropriations to which expenditures under such accounts have been chargeable theretofore are hereby repealed. There are authorized to be appropriated, annually, from such account such sums as may be necessary to meet any expenditures of the character now chargeable to the appropriation accounts abolished by this section. The Secretary of the Treasury or the Commissioners of the District of Columbia, as the case may be, shall submit with their annual estimates of appropriations an amount necessary to meet expenditures properly chargeable to this account.

(b) (1) Unclaimed moneys, Food Administration.

(2) Unclaimed moneys of individuals whose whereabouts are unknown (Veterans' Administration).

(3) Unclaimed moneys of former patients, Veterans' Administration hospital.

(4) Unclaimed moneys of individuals whose whereabouts are unknown (relief of American citizens in Europe).

(5) Unclaimed moneys of individuals whose whereabouts are unknown (Interior, civil).

(6) Unclaimed moneys of individuals whose whereabouts are unknown (Justice).

(7) Unclaimed moneys of individuals whose whereabouts are unknown (Labor).

(8) Unclaimed moneys of individuals whose whereabouts are unknown (Navy).

(9) Unclaimed moneys of individuals whose whereabouts are unknown (State).

(10) Unclaimed moneys of individuals whose whereabouts are unknown (Treasury).

(11) Unclaimed moneys of individuals whose whereabouts are unknown (War).

(12) Unclaimed individual Indian moneys.

(13) Unclaimed funds of discharged patients, Saint Elizabeths Hospital.

(14) Return of unclaimed money deposited by clerks of courts.

(15) Outstanding liabilities, lands.

(16) Return of subscriptions to Liberty Bond issues placed through American consulates.

(17) Return of subscriptions to Liberty Bond issues by civilian employees of Naval Establishment.

(18) Refund to depositors, excess licenses, under section 10 (c), Trading with the Enemy Act.

(19) Return of subscriptions to Liberty Bond issues placed through the postmaster at Philadelphia, Pennsylvania.

(20) Unclaimed funds of Federal prisoners.

(21) Rosa Goldman—cash bail exacted.

(22) Unclaimed funds of Jei Bei Ota, deceased Japanese alien.

Sur Petition of the Pennsylvania Railroad Company for an Order Awarding to it Moneys Formerly in the Registry of the Court and Turned Into the Treasury of the United States

(*Filed October 16, 1936*)

Argued October 9th, 1936

DICKINSON, J. OCTOBER 15TH, 1936.

This cause was argued in the absence of the United States Attorney. A ruling was withheld to give the United States an opportunity to be heard. In view of the conclusion reached the United States has no interest in the petition. The like comment applies to the Commonwealth of Pennsylvania which has likewise filed an answer to the petition.

DISCUSSION

1. The real question is that of the ownership of the moneys which were paid into the Registry of the Court. The first question is what has this Court to do with the controversy. The moneys, the ownership of which is in dispute, are no longer in the Registry of the Court. The answer to this question is to be found in the Act of Congress which makes it the duty of this Court when moneys, once in its Registry, have been, as required by law, paid into the Treasury of the United States, as is the case here, to in effect certify to whom the moneys belong, if a claimant to them appears. The Pennsylvania Railroad Company is such claimant. The question raised is whether the moneys rightfully belong to the claimant. Other claimants are only indirectly, although really, concerned.

2. The title set up by the railroad to the moneys is that its money was paid into the Registry of the Court for the benefit of the bondholders of the Pennsylvania Canal Company failing whom the money under, what may be called a resulting trust, reverts to the railroad. In other words, if a bondholder claimant appeared, the railroad concedes his first claim to the money but in the absence of any such claimant the thus unclaimed money remains the money of the railroad.

This claim of the railroad has been pressed upon us in an argument of clarity and force. It might well be found to be persuasive if it were based upon a misconception or in a sense two. One is that these moneys are not the moneys of the Railroad Company but were paid into Court as the moneys of the bondholders of the Pennsylvania Canal Company. It is true of course that the money was the money of the Railroad Company who paid it over. When so paid it ceased to be the money of the Railroad Company as completely as when any one under an obligation to pay meets his obligation by payment. One who pays his note, payable at a Bank which holds it for collection has no right to the return of his money because the payee does not call upon the Bank for it. The money paid belongs to the payee and no one can lay successful claim to it except under a title derived through the payee. Title by escheat is no exception to this rule because an escheat is predicated upon the principle that the State is the ultimate heir or residuary legatee of the person to whom the escheated thing belongs. The other misconception is that these moneys ever were the moneys of the railroad Company. It

merely had at one time the physical custody of the money. It was no more its money than one who holds a sum of money in trust for others and who pays over the moneys for which he is accountable, owns the money which he thus pays. It does not belong to him but to his cestui que trustent. The theory on which the bondholders recovered from the railroad company was that it had received moneys and property of the Pennsylvania Canal Company which it held as trustee for the bondholders of that Company. (*Brown* v. *Pennsylvania Canal Co.*, 235 Fed. Rep. 669.)

The money which the railroad company paid into the Registry of this Court were not its own moneys but the moneys of the different bondholders for each of whom it had held the moneys. This Court held that the unclaimed part of the moneys should not be distributed to those of the bondholders who had proven their claims. Why? Because these moneys did not make up a common fund for distribution among bondholders who proved their claims but the fund was the aggregate of the sums belonging to a number of individual bondholders to whom as individuals it belonged. (*Brown* vs. *Pennsylvania*, 274 Fed. Rep., 467.)

By the same token as it belongs to them it does not belong to the railroad company. There is no analogy between the situation here presented and a surplus in the hands of an assignee for the benefit of creditors. There the conveyance is, it is true, for the benefit of the creditors of the assignor but the property conveyed is none the less his property. It is a nearer analogue to suppose distribution of a fund among a number of named distributees,

some of whom do not collect the sums awarded them. Title to the money awarded would be in the distributee; in his legal representative, if deceased; in any one to whom he had assigned his claim or to one claiming through him by escheat or otherwise. No one who could not show some such title would have a claim.

In speaking of title by escheat, we are of course speaking not of title to this fund but of a title by escheat when it exists. The Commonwealth of Pennsylvania has made answer to the claim of the Railroad Company. We are not now determining the claim of the Commonwealth by escheat. Its title will be demonstrated if and when it asserts it. All which is now ruled is that the Pennsylvania Railroad Company has shown no title to the moneys in question.

The prayer of the petition should be denied. A formal decree may be submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 439

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PHILIP KLEIN, ESCHEATOR OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ALBERT H. LADNER, JR.,
A. JEER CREEKOFF,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 439

IN THE MATTER OF ESCHEAT OF MONEYS IN CUSTODY OF UNITED STATES TREASURY.

MOTION TO DISMISS APPEAL OR TO CONFIRM DECREE OF COURT BELOW.

And now, to wit, this first day of September, 1937, Philip Klein, Escheator of the Commonwealth of Pennsylvania, by his counsel, Albert H. Ladner, Jr., Esq., and A. Jere Creskoff, Esq., moves the Supreme Court of the United States to dismiss the appeal of the United States of America, or to confirm the Decree of the Court of Common Pleas of Philadelphia County as confirmed by the Supreme Court of Pennsylvania in the within proceedings.

ALBERT H. LADNER, JR.,
A. JERE CRESKOFF,
Attorneys for Philip Klein.

IN THE

SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

JANUARY TERM, 1937

No. 164

IN THE MATTER OF ESCHEAT OF MONEYS IN CUSTODY OF UNITED STATES TREASURY.

APPELLEE'S STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The Nature of Case and the Rulings Below.

On May 2, 1911, a petition was filed in the United States District Court for the Eastern District of Pennsylvania by one Alice Frances Brown, setting forth that she was the owner of certain bonds issued by the Pennsylvania Canal Company secured by a mortgage on its property; that she filed the said petition on behalf of herself and the other bondholders; that certain moneys and assets chargeable with the payment of the principal of the bonds had been improperly diverted; and praying for an order for payment of the principal of the bonds.

The United States District Court entered a decree in favor of the bondholders and directed payment to them of the amount diverted in proportion to their respective holdings of bonds. The bondholders were required to file their claims in the said proceedings. Most of the bondholders filed, but a number failed to do so. As to the latter, the court ordered that the money payable to them be paid into the Registry of the said court.

After extensive search and passage of considerable time, the owners could not be located, and after a lapse of five years, in accordance with the Act of Congress in such case made and provided, the moneys were deposited to the credit of the Treasury of the United States by a bookkeeping entry in the Federal Reserve Bank in the city of Philadelphia, transferring the said moneys from the account of the Registry of the United States District Court for the Eastern District of Pennsylvania to the account of the Treasury of the United States.

The said Act of Congress reads as follows:

> "In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States. Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders."
>
> Act of March 3, 1911, c. 224; R. S. Sec. 996; 36 Stat. 1083; 28 U. S. C. 852.

The Commonwealth of Pennsylvania, claiming to be the successor in title to the said funds by escheat, filed a petition with the United States District Court for an order directing the payment to it of the unclaimed funds. The court dismissed the petition without prejudice, saying that while it had power under the Act of Congress to order payment of the moneys to the person entitled, it had no power to enter a decree of escheat, and that when the Commonwealth of Pennsylvania should be able to show title to the moneys, it would then be the duty of the United States District Court to pass judgment upon the title set up.

The Commonwealth of Pennsylvania, by its escheator, then filed a petition with the Court of Common Pleas of Philadelphia County in the State of Pennsylvania, praying for a decree of escheat. The Court of Common Pleas granted the prayer and entered the decree, thereafter affirmed by the Supreme Court of Pennsylvania. Said decree is as follows:

> "And now, to wit, this 1st day of October, 1936, this cause having come on before the Court, for hearing on Amended Petition for Escheat of certain moneys, and upon the answer thereto of the United States of America, and all other proceedings, and after hearing duly had, upon notice duly given, in accordance with the order of the Court, to all parties in interest,
>
> "It Is Ordered and Decreed that
>
> "Whereas, in the matter of Alice Frances Brown et al. *v.* Pennsylvania Canal Company et al., No. 677 in Equity of the United States District Court for the Eastern District of Pennsylvania, moneys in the amount of $16,874.49 were paid into the Registry of the United States District Court for the Eastern District of Pennsylvania on January 22, 1919, and
>
> "Whereas, thereafter on June 26, 1926, these moneys were deposited to the credit of the Treasury of the United States, subject to the order of the Court from which the said moneys were received, to wit, the afore-

mentioned United States District Court for the Eastern District of Pennsylvania, under the provisions of the Act of Congress of March 3, 1911, C. 224, Revised Statutes 996; 36 Statutes 1083, 28 United States Code 852, and

"Whereas the original owners of the said moneys have been unknown for a space of seven years and more, the said sum of $16,874.49 is Hereby Declared Escheated to the Commonwealth of Pennsylvania, and Philip Klein, Escheator, duly appointed under the laws of the Commonwealth of Pennsylvania to prosecute the claim of the Commonwealth of Pennsylvania to these moneys, is hereby directed to make application to the United States District Court for the Eastern District of Pennsylvania for an Order by the said Court directing the payment of the said moneys to the said Philip Klein as Escheator of the Commonwealth of Pennsylvania in accordance with the Acts of Congress in such case made and provided.

By the Court.

(Sgd.) FRANK SMITH, *J.*"

The decree is a finding of escheat and an authorization to the escheator to make application to the United States District Court for an order of that court directing the payment of the moneys in question to the Commonwealth of Pennsylvania.

Statement of Grounds Making Against Jurisdiction.

Objections to Jurisdiction.

I. The United States is not a party whose rights are affected by the decree of the State court, and has no standing to appeal from the judgment of the Supreme Court of Pennsylvania. As said in *Lampasas* v. *Bell*, 180 U. S. 276, 283, quoting *Clark* v. *Kansas City*, 176 U. S. 114, 118:

"'A Court will not listen to an objection made to to constitutionality of an act by a party whose rights

it does not affect, and who therefore has no interest in defeating it.' That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance."

So, in *Warehouse Co.* v. *Tobacco Growers*, 276 U. S. 71, 88, 48 S. Ct. 291, the court said:

"In order to prevail here, the Warehouse Company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below."

The interest must be a legal interest as stated in *Lampasas* v. *Bell, supra,* and not of an official nature. In *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 28 S. Ct. 275, the court stated:

"That the act of the State is charged to be in violation of the National Constitution and that the charge is not frivolous, does not always give this court jurisdiction. The party raising the question of constitutionality and invoking our jurisdiction, must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the *interest must be personal, and not of an official nature.*" (Italics ours.)

In the instant case, the appellant, the United States of America, does not assert any right or title. As stated in the opinion of the Supreme Court of Pennsylvania in the instant case, set forth in the appellant's statement of jurisdiction:

"The United States does not claim that the property has escheated to the federal government or that the federal government can escheat it."

At no stage of the proceedings has the appellant asserted any right or title to the moneys in question, nor has it at

any time maintained that any right or privilege was involved.

II. The grounds set up by the appellant are not substantial.

Rule 12 of the United States Supreme Court requires that the statement presented by the applicant for appeal shall include a statement of the grounds upon which it is contended the questions involved are substantial. This the appellant has failed to do, other than to state that considerable sums are involved. It is obvious that the rule of court did not refer to magnitude when it specified that the question must be substantial, but that the appeal should not be based upon frivolous grounds.

The decree which the appellant attacks in the assignment of error as an interference with courts of the United States, itself negatives this charge. The decree declares the escheat and directs the escheator to make application to the United States District Court for an order by the latter court directing the payment of the moneys to the said escheator, in accordance with the Acts of Congress in such case made and provided. The decree is therefore consistent with the principles of comity laid down in *Penn General Casualty* v. *Pa. ex rel. Schnader*, 294 U. S. 189, which declares:

> "While it is often said, of two courts having concurrent jurisdiction in rem, that the one first taking possession acquires exclusive jurisdiction, it is exclusive only so far as its exercise is necessary for the proper control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the Court to exercise it appropriately and to avoid unseemly conflicts. *The other Court does not thereby lose its authority to make orders which do not conflict with the authority of the Court having jurisdiction over the control and disposition of the*

property. (Italics ours.) The confirmation by the Court of Common Pleas of the right of the Insurance Commissioner to liquidate the Company did not infringe the authority of the District Court to make appropriate disposition of the property. But it did confer on the Commissioner the requisite authority to ask the District Court to relinquish its jurisdiction in favor of the State administration."

III. The judgment in the present case, while final, is not such as can be reviewed, because it is not a complete disposition of the subject matter. Such disposition can be complete only when the United States District Court grants or denies the prayer of the escheator for an order directing the payment of the moneys to him as escheator of the Commonwealth of Pennsylvania as the person entitled under the Act of Congress by the authority of which the moneys were transferred to the credit of the U. S. Treasury. As said in *Arnold* v. *U. S., for use of W. B. Guimarin & Co.*, 263 U. S. 427, 44 S. Ct. 144:

> "To be reviewable by the Federal Supreme Court, a judgment must be not only final but complete, that is, final not only as to all the parties but as to the whole subject matter and as to all the causes of action involved."

The decree of the court of common pleas was entered in accordance with the language of the Supreme Court of Pennsylvania which stated that if an escheat were found the order should be restricted to the proper presentation of the Commonwealth's claim in the United States District Court to enable that court to determine whether payment should be made to the Commonwealth. As the Supreme Court of Pennsylvania said in its opinion filed in this case:

> "Such an order would seem to be within the following language of the Chief Justice in United States *v.* Bank of New York and Trust Company, 296 U. S. 463: 'This

principle is applied in the discharge of a long recognized duty of this Court to give effect to such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States.'"

322 Pa. 481, opinion set forth in appellant's statement of jurisdiction.

The procedure followed in the present case is the only one which does conciliate the distinct and independent tribunals of the States and of the Union and was not intended by the State courts as a complete disposition of the subject matter of the proceeding.

The Supreme Court of Pennsylvania in its opinion above referred to held that the escheat statute upon which the proceeding was based was necessary in order that the fact of escheat might be determined, and the fact being found, to enable the Commonwealth then to present its claim to the District Court in control of the funds pursuant to the Act of Congress. This meaning of the Act is one which must be conclusive.

As said in *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 33:

"Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we much accept this decision of the highest Court of this State as fixing the meaning of the State legislation, as though such meaning had been specifically expressed therein. * * * And we follow the State construction even though it may not agree with our own opinion."

The appeal of the United States should be dismissed or the decree of the State Court affirmed because

(a) the appeal is not based upon substantial grounds,

(b) no right, title or privilege of the United States is involved in the present case,

(c) the State Court has carefully avoided even the appearance of interfering in any way with the sovereignty of the United States or with the Courts of the United States,

(d) the Decree is not a complete disposition of the subject matter of the proceeding.

Respectfully submitted,

ALBERT H. LADNER, JR.,
A. JERE CRESKOFF,
Counsel for Philip Klein, Escheator of the Commonwealth of Pennsylvania.

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No. 439.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1937.

UNITED STATES OF AMERICA,

Appellant,

v.

PHILIP KLEIN, ESCHEATOR OF THE COMMONWEALTH OF PENNSYLVANIA.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA.

ALBERT H. LADNER, JR.,
A. JERE CRESKOFF.

MICHAEL EDELMAN,
Of Counsel.

Dunlap Printing Co., 1315-29 Cherry Street

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QUESTIONS INVOLVED

I. Is the provision by the Pennsylvania Legislature for the escheat of moneys under the control of a Federal Court sitting in Pennsylvania a proper exercise of its legislative function?

II. Do the escheat statutes of Pennsylvania constitute an invasion of the Federal sovereignty, or does the decree complained of interfere with the custody, possession or control of the Federal Court?

III. Were the proceedings in the State Court without due process?

SUMMARY OF ARGUMENT

1. The Commonwealth of Pennsylvania has the power of escheat, as does every other State in the Union. It is a prerogative of sovereignty which vested in the Crown prior to the Revolution and when the American Colonies achieved their independence, this prerogative vested in the people of the States. The power was not delegated to the United States by the Federal Constitution and therefore the power still subsists in the people of the States independent of constitutions or statutes. It is a power which antedates constitutions and statutes. As said in the American & English Encyclopedia of Law, title "Escheat," Section 3b, Note 3:

> "The principle of escheat cannot be said to rest upon statute, but rather is a principle coeval with the existence of society and existed before statute."
>
> WHEELER v. SMITH, 9 How. 55, 78.

The power of escheat applies to property of any description within the borders of the State, and applies equally to property in the hands of individuals and to property in the custody or control of a Federal Court located within the borders of the State.

The fund in dispute arises from a debt payable by a Pennsylvania corporation, which fund was deposited in court pursuant to a decree in an equity proceeding. The fund is still under the control of the Federal Court for the Eastern District of Pennsylvania pursuant to the Act of Congress, for the purpose for which the money was deposited. It is not contended by the appellant that the Federal Government claims the fund, nor that the Federal Government can escheat it.

2. It is conceded that the State cannot take possession of property in the custody or under the control of the Federal Court, but that fact need not prevent the judicial

determination by the State of the succession to unclaimed property under the control of a Federal Court located within its borders.

Within the States respectively it is the State which exclusively is parens patriæ of ownerless property and this result cannot be affected by the fact that the property might happen to be in the registry of a Federal Court. Though in the registry it is nevertheless a part of the general property in the State. The State succeeds to such ownerless property and has the right through its escheator to apply therefor to the Federal Court.

See AMERICAN LOAN & TRUST CO. v. GRAND RIVERS COMPANY, 159 Federal 775, 780.

The decree complained of is not an invasion of the jurisdiction of the Federal Court. It merely declares and establishes the title to the fund, but makes no provision for the enforcement of the decree. On the contrary, the Supreme Court of Pennsylvania recognized that as to the disposition of the fund the Federal Court has exclusive jurisdiction and therefore the decree merely gives the escheator authority to apply to the district court for an order of payment. Such authority given by a State Court to a State official to make application to a Federal Court for an order by the latter court is not a novel procedure and has been recognized quite recently by the Supreme Court of the United States.

See PENN GENERAL CASUALTY v. PENNSYLVANIA EX REL SCHNADER, 294 U. S. 189.

The appellee stresses the fact that the decree complained of has given to the Commonwealth of Pennsylvania nothing more than the authority to make application to the United States District Court for the order to which the Commonwealth of Pennsylvania asserts it is entitled under the relevant Act of Congress.

When the State of Pennsylvania will make such application to the Federal District Court it will have to prove its title as would any other litigant before that Court.

3. The decree entered does not violate the Fourteenth Amendment to the Federal Constitution. Service by publication is due process when it is the only service possible under the circumstances of the case.

SECURITY SAVINGS BANK v. STATE OF CALIFORNIA, 263 U. S. 282.

ARGUMENT

I

IS THE PROVISION BY THE PENNSYLVANIA LEGISLATURE FOR THE ESCHEAT OF MONEYS UNDER THE CONTROL OF A FEDERAL COURT SITTING IN PENNSYLVANIA A PROPER EXERCISE OF ITS LEGISLATIVE FUNCTION?

The Act of General Assembly of the Commonwealth of Pennsylvania approved May 2, 1889, P. L. 66, as amended by the Act of June 28, 1935, P. L. 475, 27 P. S. 334, provides:

> "Section 2. That whensoever any money, estate or effects shall have been, or shall hereafter be paid into, or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk or other officer of any of said courts, and the rightful owner or owners thereof shall have been unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same."

The Act of May 2, 1889, P. L. 66, as amended by the Act of June 28, 1935, P. L. 475, 27 P. S. 41, provides:

> "Section 5. * * * Whenever an escheat has occurred, or shall occur of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth."

These enactments are an exercise of the power of the legislature, which has long been recognized as absolute, except as limited by the Constitution of the United States and the Constitution of Pennsylvania. The principle is clearly stated in COMMONWEALTH *ex rel.* v. REEDER, 171 Pa. 505, 513, as follows:

> "Whatever the people have not, by their constitution, restrained themselves from doing, they, through their representatives in the legislature, may do. This latter body represents their will just as completely as a constitutional convention in all matters left open by the written constitution. Certain grants of power, very specifically set forth, were made by the states to the United States, and these cannot be revoked or disregarded by state legislation; then come the specific restraints imposed by our constitution upon our legislature; these must be respected; but in that wide domain not included in either of these boundaries the right of the people through the legislature to enact such laws as they choose, is absolute."

This proposition has been reaffirmed many times, most recently in TRANTER v. ALLEGHENY COUNTY AUTHORITY, 316 Pa. 65, 75.

There is no provision in the Constitution of Pennsylvania or the Constitution of the United States which forbids the enactments above quoted. The appellant has not pointed to any clause of either constitution, but has contented itself with the general statement that the statutes involved are void.

The mere fact that the property in question has been in the custody or control of the Federal Court does not affect the Commonwealth's right to escheat. The law on this point is well expressed in AMERICAN LOAN & TRUST COMPANY v. GRAND RIVERS CO. (C. C. KENTUCKY, 1908) 159 Federal 775, 780, as follows:

> "The National Government is not in any case the parens patriæ to which ownerless property of any

sort in any state of the Union passes. We think that within the states respectively it is the state which exclusively is parens patriæ, and this result cannot be affected by the fact that the property might happen to be in the registry of a federal court. Though in the registry it is nevertheless a part of the general property in the state. The state might with more plausibility be held to succeed to the title of such property, and to have the right through its escheator to apply to the court for it if any government is entitled to do so."

The same principle is recognized in COMM. v. VON ZEDWITZ, 215 Ky. 413. That case arose out of the "Trading with the Enemy Act," 12 U. S. C. 3115½ f, which provided for the delivery to the Alien Property Custodian of all money owing or belonging to, or held for, an enemy, and for the deposit of such moneys in the Treasury of the United States; that any person not an enemy claiming an interest in any such money held by the Alien Property Custodian or by the Treasury might file a claim with the Custodian, and the President might order the payment of the fund to the claimant; or the claimant might file his claim in the District Court of the United States for the District in which the claimant resided, and if his title was established, the court should order the payment to the claimant of the money held by the Custodian or the Treasury of the United States. Certain real estate in Kentucky was seized by the Custodian. The question was whether Kentucky's right of escheat was lost. The court declared it was not, saying (422):

"The act took away from the Commonwealth of Kentucky no right it had of escheating the lands in question * * *."

That the right of escheat of property is not lost by the state merely because such property has been taken into the custody of the Federal Court of a Federal agency, is perhaps more readily understood in the case of real estate,

but the principle is equally applicable to personal property thus taken into the custody of the Federal Court.

A proper understanding of the purpose and scope of the Pennsylvania Acts of Assembly may be derived from an examination of the Act of Congress, under the provisions of which these moneys were paid into the Registry of the United States Court. That act, R. S. Section 995; May 29, 1920, C 214 Section 1, 41 Stat. 654, 28 U. S. C. A. 851, reads as follows:

> "All moneys paid into any court of the United States or received by officers thereof in any cause pending or adjudicated in such Court shall be forthwith deposited with the Treasurer or a designated depositary of the United States, in the name and to the credit of such court."

R. S. Section 996, Act Mar. 3, 1911, c. 224; 36 Stat. 1083, 28 U. S. C. A. 852, reads:

> "In every case in which the right to withdraw money so deposited has been adjudicated, or is not in dispute, and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the Judge or Judges of the said court, or its successor, to cause such money to be deposited in the Treasury of the United States in the name and to the credit of the United States. Any person or persons, or any corporation or company entitled to such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States Attorney, and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant."

The purpose of the Pennsylvania Acts of Assembly is the establishment of the Commonwealth's title to such moneys, and the qualifying of the Commonwealth as a "person entitled" within the meaning of the Federal Act. No right or title of the United States is involved.

Reference to the unreported opinion filed by the Honorable Oliver B. Dickinson, Judge of the Federal Court, in another part of these very proceedings, is pertinent. Judge Dickinson said (Appendix, post, page 27):

> "These moneys are in the hands of this court, or still, as to distribution, under its control. If any one turned up as a claimant owner, we could award the moneys to him. 'Any one' would include Pennsylvania. Any claimant, however, would be required to show title before he could receive an award. This likewise would include Pennsylvania * * *.
>
> "The Act of Congress which makes these moneys subject to the award of this Court does so only in favor of 'any person or persons, corporation or company' who can lay successful claim of ownership thereto. Assuming arguendo the State to be within this Act, it is able as yet to show no title to these moneys. Under the facts it may or may not be able to secure a judgment of escheat, but it has not done so * * *.
>
> "Our powers are those conferred by Congress, and Congress has restricted us to awarding the fund to the one who has title to it. Congress has passed no general escheat Statute. The State has no title and no title by escheat can be acquired otherwise than by a compliance with those (Pa.) Statutes. When the Petitioner is able to show title to these moneys it will then be our duty to pass judgment upon the title set up."

The very wording of the act shows that the court retains control of the money after it is deposited in the Treasury of the United States. Judge Dickinson, of the Federal Court, has left no doubt as to this fact. He says in his opinion (Appendix, post, page 27):

> "These moneys are in the hands of this court, or still, as to distribution, under its control."

The wording of the Pennsylvania Act of Assembly paraphrases that of Judge Dickinson, and was clearly intended to comprehend the present situation.

The moneys here involved are actually within the confines of Pennsylvania, although transferred by a bookkeeping entry from the registry of the Federal Court to the United States Treasury. The moneys are still under the control of the Federal Court in Pennsylvania, and for the purpose of the present proceeding, may be regarded as still within this State. This principle is recognized in WYMAN v. HALSTEAD, 109 U. S. 654, 658, which states:

> "The United States, in their sovereign capacity, having no domicile in any one part of the Union, rather than in any other, do not, by establishing at the national capital a treasury for the transaction of the principal business of the financial department of the government, confine their presence or their powers to this spot."

And, as is said in ORINOCO IRON CO. v. METZEL, 230 Fed. 40, 45 (6th Cir.),

> "The question is whether the fact that the fund was held in the Treasury of the United States alters the rule. No question of the right of the United States to the fund is involved. The government makes no claim to it in whole or in part. The fact that the seat of government is in the District of Columbia and that the general treasury is there situated, do not necessarily affect the issue, for the United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union."

It is not disputed that the persons entitled to the moneys involved have been unknown for more than seven years. The conditions specified in the statute being shown to exist, it was the duty of the Court of Common Pleas to enter the decree or judgment of escheat in favor of the Commonwealth. Armed with such decree, the Commonwealth is now in position to apply to the Federal Court for an order directing the Treasury of the United States to pay the money to the Commonwealth. Upon such appli-

cation, the Federal Court may then determine whether or not the Commonwealth is a "person entitled" within the meaning of the Federal Act.

The United States cannot be harmed in any way by such a procedure, because it can raise the issue of the status of the Commonwealth as a "person entitled" when that status is thus asserted in the Federal Court. There is no interference, in such a procedure, with the powers of the Federal Court, and no assertion of any right in the State Court which impinges upon the powers of the Federal Court.

It must be remembered that the Legislature of Pennsylvania has made a studied effort to bring before the Federal Court the question as to the right to these unclaimed moneys. The Act of April 21, 1921, P. L. 223, Sec. 5, provided for the escheat of such moneys, and under that act, the Commonwealth filed its petition in the Federal Court. The petition was dismissed, without prejudice, not on the merits, but purely because of Judge Dickinson's view that the Federal Court lacked jurisdiction to enter a decree of escheat. The Act of 1935 was an effort to give the Federal Court an opportunity of deciding, on the merits, the title to the unclaimed moneys. Unless the purpose of the Legislature is carried out, the question of the right to these moneys, to which the United States asserts no right, will ever be undetermined.

II

DO THE ESCHEAT STATUTES OF PENNSYLVANIA CONSTITUTE AN INVASION OF THE FEDERAL SOVEREIGNTY, OR DOES THE DECREE COMPLAINED OF INTERFERE WITH THE CUSTODY, POSSESSION OR CONTROL OF THE FEDERAL COURT?

The appellant has erroneously conceived the Pennsylvania statute to be an effort to take the money deposited in the registry of the United States District Court, with-

out the sanction of that court, and thus to interfere with that court. An examination of the act shows a careful avoidance of any possible inference that such interference is contemplated. The decree from which this appeal is taken is merely a declaration that under the laws of the Commonwealth of Pennsylvania an escheat has occurred. No order directing the payment of the money to the Commonwealth is provided for, and the escheator is merely directed to make application to the Federal Court for payment under the relevant Act of Congress.

The State of Pennsylvania has not attempted by the Pennsylvania Acts of Assembly to interfere with, or to control or direct, the actions of the United States District Court, and the objection raised as to the validity of the statutes must, therefore, fall.

Whether the United States District Court will recognize such decree of escheat as constituting the Commonwealth of Pennsylvania a "person entitled" under the Federal Act, is a question which must be left entirely to the determination of the Federal Court under the Federal Act.

The present proceeding was instituted for the purpose of completing what the Federal Court has declared is a step preliminary to the order of the Federal Court directing the United States Treasury to pay the money over to the Commonwealth, that step being the establishment of the Commonwealth's title, and the qualifying of the Commonwealth as a "person entitled" within the meaning of the Federal Act.

It was not intended by the establishment of the dual system of government in the United States that any person should be deprived of his rights by any technical differentiation between the powers of the Federal Courts and of the State Courts. There is no doubt that if one forum could consider the rights of all parties involved, that forum could properly determine the right of the Commonwealth to the escheat of the moneys now under the control of the Federal Court. By an accident of governmental

policy, there has been a separation of judicial control into Federal and State Courts. The original proceeding out of which these moneys arose, could well have been taken in the State Court, but by reason of the law providing that where there is diversity of citizenship, a proceeding may be brought in a Federal Court, the proceeding was there instituted. It is inconceivable that it was ever intended by the framers of our Federal Constitution that the right to take the proceedings into a Federal Court should result in the deprivation of any person, and especially of a State, of any rights to which it would have been entitled had the proceedings been in the State Court. This was recognized in McCULLOCH v. STATE OF MARYLAND, 4 Wheat. 316, in which the court, in deciding against the right of the State of Maryland to tax the operation of national banks, pointed out that a State was not deprived by such decision of any resources that it originally possessed. The court said, page 436:

> "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

The care with which Federal Courts have refrained from interfering with courts of concurrent jurisdiction in the State is well illustrated by the case of HEIDRITTER v. ELIZABETH OIL-CLOTH COMPANY, 112 U. S. 294, which involved a dispute between the purchaser of property arising from a mechanic's lien action in the State of New Jersey, as against the purchaser from the United States Marshal who had seized the property for a violation of a Federal Act. The court said:

> "We refrain from pronouncing the proceedings in the State Court of New Jersey invalid, so far as they

> do not affect the legal title of the purchaser at the Marshal's sale to the premises in controversy. We decide * * * not that they are invalid for the purpose of declaring and establishing the lien, but that they are not good for the purpose of enforcing it, as was attempted by a sale and conveyance of the premises in controversy."

The right of escheat has not been delegated by the States.

The Court said in WHEELER v. SMITH, 9 How. 55:

> "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the states * * * and this power still remains with them, except so far as they have delegated a portion of it to the Federal government."

And as is said in CRANE v. REEDER, 21 Mich. 24, 76:

> "There has never been an instance of escheat claimed to have accrued to the United States since they came into existence."

The appellant would deprive the Commonwealth of its day in court, which neither the people of Pennsylvania nor those of the other States, when agreeing to the Constitution of the United States, could ever have contemplated should be lost. On the other hand, if the position of the Commonwealth is taken by this Court, there is no loss of any one's rights by reason of the fortuitous initiation of the proceedings against the Pennsylvania Canal Company, a Pennsylvania corporation, in the Federal Court, rather than in the State Court.

The appellant cites a number of cases in support of the proposition that a statute amounting to an invasion of the sovereignty of the United States is unconstitutional, and that where a court of competent jurisdiction has taken possession of property, such property is withdrawn from the jurisdiction of other courts, and that no other court has the right to interfere with its custody or possession.

In the cases cited, there was an invasion of the Federal sovereignty, or an interference by one court with the jurisdiction of another.

There is not, however, in the present case, any invasion of the sovereignty of the United States, nor any interference with the jurisdiction of the Federal Court. To the contrary, there is, in recognition of the sovereignty of the United States, a proceeding in the State Court preliminary to submission by the Commonwealth of its claim to the Federal Court.

The assertion by the Commonwealth of one of its powers of sovereignty, that of escheat, does not constitute an invasion of the sovereignty of the United States, because this power is one which belongs to the State and not to the United States. As said in McCULLOCH v. STATE OF MARYLAND, 4 Wheat. 316, 410:

> "In America, the powers of sovereignty are divided between the government of the United States and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

There is no conflict here between the two sovereignties. One, the State, has the power of escheat; the other, the United States, does not have this power. The statutory declaration by the Pennsylvania Legislature of the conditions under which the escheat shall be considered to have occurred is not an invasion of the Federal Sovereignty, nor is the provision of the State law that the State Court shall determine whether those facts exist in a particular case an invasion.

The grant by Congress to the Federal Courts, of jurisdiction in cases where there is diversity of citizenship, was an execution of the power granted to it by the Constitution to constitute tribunals inferior to the Supreme Court. It was not intended by such grant of jurisdiction to de-

prive any State of any of its powers, and were it to do so, such grant itself would be unconstitutional. As said in McCulloch v. State of Maryland, *supra*, at page 423:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act is not the law of the land."

In Martin v. Hunter's Lessee, 1 Wheat. 304, cited by the appellant, the court said (page 347):

> "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states * * * it enables the parties, under the authority of Congress, to have the controversies heard, tried and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases, should not have been left to the cognizance of state courts."

It must be noted that the court stated that what was given under the Act of Congress, was the authority "to have the controversies heard, tried and determined before the national tribunals." No rights are created, nor are any taken away.

This is made clear in Ableman v. Booth, 21 How. 506, in its discussion of the Constitution, as to the different language employed by the Constitution when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. The court said (page 519):

> "In the first case, it provides that 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law

> of the land.' * * * And in conferring judicial power upon the Federal government, it declared that the jurisdiction of its courts shall extend to all cases arising under 'this constitution' and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution."

It is to be seen, therefore, that the fact that the Federal Court has jurisdiction of a cause does not carry with it a denial to a State of a power which it would have had if the Federal Court had not had jurisdiction. If the State Legislature, in exercising that power, requires that one of its courts determine first the existence of the facts upon which the exercise of the power depends, the determination by such State Courts is not an interference with the Federal Court.

The power thus existing in a State, and the facts upon which the exercise of this power having been determined by the State Court, it may be necessary in order for the State to procure the benefit or to bring about the fruition of the exercise of the power, to make application to a Federal Court to recognize the power, and to accord to the State the right to which this power entitled it. Such an application under the authority of the State Court is seen in the recent case of PENN GENERAL CASUALTY v. PENNSYLVANIA *ex rel.* SCHNADER, *supra*.

The Supreme Court of the United States has recognized the prerogative right of a State based upon its sovereign character in relation to assets in the control of a Federal Court. In MARSHALL v. NEW YORK, 254 U. S. 380, the court considered the right of a State to priority out of a debtor's property for debts due to the State. Justice Brandeis said, page 384:

"It (New York) asks merely to have its prerogative right enforced against property on which there is no prior lien and upon which it is impossible to levy because the property has been taken out of the hands of the debtor and placed in the custody of the court for purposes of protection and distribution."

Page 385:

"The priority of the state extends to all property of the debtor within its borders, whether the debtor be a resident or non-resident, and whether the property be in his possession or in *custodia legis*. A priority is therefore enforceable against the property in the hands of the receiver appointed by the federal court. For a receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the state. * * * Since the prerogative right of the state could not be enforced by levy and seizure, an application to the court for payment of the debt due was the appropriate remedy."

Page 386:

"The fact that a right rests on the common law and independently of any statute does not, of course, affect the right of enforcement in the federal court."

It must be borne in mind that the proceedings in the State Court do not seek the possession of the property. As said by the Supreme Court of Pennsylvania in the matter of escheat, 322 Pa. 481:

"It may be conceded that the State cannot take possession of property in the custody of the federal government, but that fact need not prevent the judicial determination by the State of the succession to unclaimed property within its borders. The argument made for the Commonwealth concedes that the State Court can make no order on the Federal Treasury, or any other representative of the federal government, requiring the delivery of the property to the escheator; but the contention is that as the District Court, in the

proceeding brought by the escheator and referred to above, held that the Court lacked power to declare an escheat and dismissed his petition without prejudice, this proceeding in the State Court was necessarily instituted to determine the fact of escheat, and, the fact being found, to enable the Commonwealth then to present its claim to the District Court in control of the fund pursuant to the Act of Congress."

The authority given by a State Court to a State official to make application to a Federal Court for an order by the latter court is not an unusual or novel procedure, and a very recent sanction of such authority and recognition thereof by the United States Supreme Court is seen in the case of PENN GENERAL CASUALTY v. PENNSYLVANIA *ex rel.* SCHNADER, 294 U. S. 189. The court there stated (page 198):

"While it is often said, of two courts having concurrent jurisdiction in rem, that the one first taking possession acquires exclusive jurisdiction, it is exclusive only so far as its exercise is necessary for the proper control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the Court to exercise it appropriately and to avoid unseemly conflicts. The other Court does not thereby lose its authority to make orders which do not conflict with the authority of the Court having jurisdiction over the control and disposition of the property.

"The confirmation by the Court of Common Pleas of the right of the Insurance Commissioner to liquidate the Company did not infringe the authority of the District Court to make appropriate disposition of the property. But it did confer on the Commissioner the requisite authority to ask the District Court to relinquish its jurisdiction in favor of the State administration."

See also PENNA. v. WILLIAMS, 294 U. S. 176;
MORAN v. STURGES, 154 U. S. 256;
PALMER v. TEXAS, 212 U. S. 118.

The avoidance of unseemly conflict between various courts has been a matter of concern and treatment by the United States Supreme Court and is expressed by the Chief Justice of the United States Supreme Court in the case of UNITED STATES v. BANK OF NEW YORK AND TRUST COMPANY, 296 U. S. 463, as follows:

> "This principle is applied in the discharge of the long recognized duty of this court to 'give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States.' Taylor v. Carryl, 20 How. 583, 595."

Too much stress cannot be laid upon the fact that the decree entered by the court below in this case has given the Commonwealth of Pennsylvania nothing save the bare right to make application to the United States District Court for the order to which the Commonwealth asserts it is entitled under the Act of Congress.

III

WERE THE PROCEEDINGS IN THE STATE COURT WITHOUT DUE PROCESS?

The unknown owners of the moneys were notified by publication of the proceedings in escheat. That notice, under the circumstances of the case, was sufficient service. In SECURITY SAVINGS BANK v. STATE OF CALIFORNIA, 263 U. S. 282, cited by the appellant, Justice Brandeis said:

> "The legislature evidently assumed that it would be impossible to serve such depositors personally. The Supreme Court of the State held that the legislature was warranted in this assumption. The owners of the deposits were therefore treated like persons unknown. We can not say that the view entertained by the legislature and the State courts was so unreasonable as to constitute a denial of due process."

If the decree of the State Court is recognized by the United States District Court upon the application of the escheator, and the moneys are ordered to be paid to the Commonwealth, the presently unknown owners, should they later appear, will have a further period of three years from the date of the decree of escheat to traverse the finding of escheat and to receive back again from the Commonwealth the moneys paid to the Commonwealth. Act of May 20, 1921, P. L. 946, Sec. 1, 27 P. S. 91. The limitation of time within which their claims must be presented is not a deprivation of a right. As said in ALTON'S ESTATE, 220 Pa. 258, arising out of escheat proceedings,

> "Limitations of actions, either by prescription or by statute, are older than any of our constitutions or common law. * * * While recognizing the right and furnishing a remedy for its enforcement, the legislature restricts and limits the remedy by providing that it shall be pursued within a reasonable time. * * * The power of the legislature to furnish the remedy includes the power to impose reasonable limitations on its enforcement."

In TERRY v. ANDERSON, 95 U. S. 628, the court said:

> "Statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * *"

In TYLER v. COURT OF REGISTRATION, 175 Mass. 71, Justice Holmes said:

> "Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims without any notice of judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case."

The Supreme Court of the United States in BLINN v. NELSON, 222 U. S. 1, said:

> "Now and then an extraordinary case may turn up, but constitutional law, like other mortal contrivances, has to take some chances, and in the great majority of instances, no doubt justice will be done. Shorter time than one year has been upheld."

DISCUSSION OF APPELLANT'S BRIEF

The case of HARRIS v. DENNIE, 3 Pet. 292, cited in the appellant's brief (page 11), was a case where the United States had custody of certain imports and the Deputy Sheriff of Massachusetts County attached the goods. Clearly this case is dissimilar to the instant case where no effort had been made to interfere with the custody of the Federal Court.

Similarly, in the case of IN RE JOHNSON, 167 U. S. 120, referred to on page 12 of the appellant's brief, there was an attempt by a court through habeas corpus proceedings to interfere with the custody of a United States Court of a prisoner charged with rape.

TARBLE'S case, 13 Wall. 397 (page 12, appellant's brief), was an attempt by a State Court by writ of habeas corpus to procure the surrender of a person who had enlisted in the United States Army. This was clearly an interference with the sovereignty of the United States.

MCKAY v. KALYTON (204 U. S. 458, page 12, appellant's brief) was one in which the State attempted to exercise jurisdiction as to Indian lands allotted to an Indian. Under the law by which the land was allotted, the Federal Courts were given exclusive jurisdiction to determine controversies relating thereto. The State never had any authority as to the lands before they were allotted and there was no basis for the attempted jurisdiction.

The case of WABASH R. R. COMPANY v. ADELBERT COLLEGE, 208 U. S. 609, cited on page thirteen of the appellant's brief held that a State Court had no jurisdiction to order a sale of property held in the custody of a Federal Court and, therefore, could not declare a lien upon the property. The court indicated, however, that the lien was forbidden only because it was sought not for itself, but as part of the order of sale. It appears from a reading of the case that if the lien were not for the purposes of the order of sale, jurisdiction of the State Court in declaring the lien would have been proper.

In PALMER v. TEXAS, 212 U. S. 118, referred to by appellant on page twelve, the court, while agreeing with the general proposition, continued in the following language (page 126):

> "If it is established that the State Court had acquired jurisdiction over this property before the application in the federal court was made, the court of the state had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such process and jurisdiction."

In the instant case the appellant is attempting to interfere with the power of the Federal Court, which alone has the right to determine to what extent the decree of the State Court should be recognized. This question, however, cannot arise until the escheator of the Commonwealth of Pennsylvania makes application to the Federal Court in accordance with the decree of the State Court for an order of payment under the Act of Congress.

As said in WHITE v. MECHANICS SECURITIES CORPORATION, 269 U. S. 283, 301:

> "The U. S. seized the property in question from an enemy and of course could do with it what it liked. When it comes into court and seeks to appropriate

it there is a natural notion that it has elected to use its power. Its power could not be denied if the Attorney General were the complete mouthpiece of its will. But whatever his authority, it is subordinate to Congress; and Congress has more authentically delivered the sovereign intent by the statute to which we have referred.

"The statute gives an absolute right to the suitor who comes within its terms, unqualified by any reservation of a superior lien in case the U. S. should be a rival creditor. There is no reservation of priority in the Act, or of a right to intermeddle in the private suit of another, or of any advantage that it might have as captor of the fund. Whether from magnanimity or forgetfulness, it has assumed the position of a trustee for the benefit of claimants and has renounced the power to assert a claim except on the same footing and in the same way as others, if at all."

The Federal Court could easily decide this question for itself upon application by the escheator of the Commonwealth of Pennsylvania for an order of payment consistent with the decree entered by the Pennsylvania Court and under the relevant act of Congress.

The appellant points to the fact that the United States is a statutory trustee. There can be no question but that this trust is a dry trust, and that the United States as a trustee is a mere passive depositary of the property, with no active duties to perform. The position of the United States as such is seen in WHITE v. MECHANICS SECURITIES CORPORATION, *supra*, at page 301.

In COMMONWEALTH v. THOMAS' ADM'R, 140 Ky. 789, and IN RE MELROSE AVENUE, 234 N. Y. 48, it was decided that while proceedings in escheat are necessary to determine the title, the title is not given by the proceedings but occurs when the conditions exist upon which the title is based.

In IN RE MELROSE AVENUE, *supra*, Justice Cardozo said:

"The State is the ultimate owner and is in effect the ultimate heir. Ejectment or inquest of office 'does

not constitute an escheat.' It is the remedial expedient by which the fact of escheat is authenticated and where there is uncertainty or contest. The fact and not the record is the origin of title * * *. Later scholarship has thought it the better view 'that an inquest of office is only a proceeding to ascertain the title of the crown by escheat and not an essential condition to the vesting of title.'"

The appellant has asserted that the situs of the property depends upon the control over the property and has thereupon concluded that the control of the court is what determines the situs. The Pennsylvania Statute provides for the escheat of moneys in the control of the Federal Court sitting in Pennsylvania, and even if we adopt the appellant's interpretation of situs, the decree was properly entered. However, Justice Holmes has more clearly explained what we mean by the situs of a debt. In BLACKSTONE v. MILLER, 188 U. S. 189, he said:

> "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case * * *. So again, what enables any other person than the very creditor in proper person to collect the debt? The law of the same place.
>
> "Power over the person of the debtor confers jurisdiction."

Therefore, whether the jurisdiction of the State Court rests upon the indebtedness which gave rise to the deposit in the Federal Court or to the moneys themselves deposited in and still under the control of the Federal Court sitting in Pennsylvania, the property in question was within the jurisdiction of Pennsylvania and subject to escheat.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Pennsylvania be affirmed, thereby giving the State of Pennsylvania the opportunity to make application to the Federal Court for an order of payment pursuant to the relevant Act of Congress.

ALBERT H. LADNER, JR.,
A. JERE CRESKOFF.

MICHAEL EDELMAN,
Of Counsel.

APPENDIX

OPINION SUR MOTION TO DISMISS PETITION

Argued August 7, 1934.

DICKINSON, *J.*, September 6, 1934.

Leave was given to file Supplemental Briefs. The cause is now ripe for a ruling.

The main objective of these proceedings is clear enough. The petitioner who styles himself "Escheator of the Commonwealth of Pennsylvania" seeks to recover moneys, part of which is in the Registry of this Court and part in the Treasury of the United States. His claim to it is that this money is property which has escheated to Pennsylvania. Some of the obstacles he must surmount before he can get the money are suggested by the caption given to the present proceedings. We have followed the form adopted by him.

The District Courts of the United States have many capacities in which they may sit. They may sit as Courts of Law; as Courts of Equity; as Courts in Admiralty; as Bankruptcy Courts, and in many capacities. We have designated these proceedings in Equity because the Petitioner has so designated them. We have given the subheading of a motion to dismiss because the present status of the proceedings were so referred to at the argument. We have not the record before us so do not know whether any such formal motion has been made. There is no real importance in this because if the prayers of the Petitions cannot be granted the Petitions are dismissed. We do not have access to the Petitions so assume that the prayers are that this Court enter judgments of escheat by analogy

to the action which would be taken by the State Courts in escheat proceedings.

We will treat this as the real question before us. Can this Court enter a judgment of escheat in favor of the Commonwealth of Pennsylvania? It is an anticipation but we may interpolate here the comment that this is a wholly different question from that of whether this Court would recognize the claims of Pennsylvania to these moneys under a title by escheat.

These moneys are in the hands of this Court or still, as to distribution, under its control. If any one turned up as a claimant owner, we could award the moneys to him. "Any one" would include Pennsylvania. Any claimant, however, would be required to show title before he could receive an award. This likewise includes Pennsylvania.

We have been favored with a very full discussion of the subject of escheat and the right of Pennsylvania to claim these moneys by escheat as a sovereign State. We would go much beyond what we are asked to do to support such claims of a sovereign. A sovereign is emnipotent, restrained only by the laws of nature and his relations with other sovereign powers. The latter restricts him to his own domain. Within them he is the ultimate owner of everything and may take whatever he chooses to take. He may make no compensation for what he takes. This power we know as the right of eminent domain. Its existence was the prompting for the common constitutional limitation "that private property shall not be taken for public use without just compensation." The very restriction upon the exercise of the absolute power to take implies its existence. This principle of ultimate ownership is the basis for what is known as the right of escheat. The right is absolute but the sovereign will not exercise it except in the absence of other owner claimants.

There can be no question of the possession by Pennsylvania of the so-called "right of escheat." The limitation

of which we have spoken exists because every sovereign is bound by the necessities of the case to restrict the exercise of his sovereign powers to his own domains. If he did not there would be trouble. He is assumed to so agree. Pennsylvania would not, for illustration, assert the power to escheat property in New Jersey. Why? Because New Jersey is also a sovereign power with the right to escheat property within its domain. In no other way can a clash be avoided. Precisely the same principle applies to the United States. It is likewise a sovereign.

Out of this situation a conflict of rival claims might arise, the discussion provoked by which would be very interesting. Into this as yet we see no reason to go. The question before us is a narrower one.

There is a distinction between "escheatable" and "escheated." The Pennsylvania Acts of Assembly recognize this and indeed use these very phrases. The title of Pennsylvania to any property subject to escheat is not because the property is "escheatable" but because it has been escheated. We can award moneys under the control and disposition of the Court only to those who establish title thereto. The Act of Congress which makes these moneys subject to the award of this Court does so only in favor of "any person or persons, corporation or company" who can lay successful claim of ownership thereto. Assuming arguendo the State to be within this Act it is able as yet to show no title to these moneys. Under the facts it may or may not be able to secure a judgment of escheat but it has not done so. Counsel for Petitioner recognize this and hence ask this Court to enter such a judgment. Have we the jurisdictional power to so do? The touchstone of the answer to this question is to ask another. Had the Petitioner gone into one of the several Courts of Common Pleas, the Orphans' Court or the Municipal Court of Philadelphia to ask it for such judgment or decree and the like question of power had raised, how would it be

answerable? The answer would be some cited Act of Assembly had conferred the power. Where does this Court get its power? The answer given us, and it is the only answer which could be given, is "from the same Acts of Assembly." This answer is not convincing for it encounters the principle that an Act of Assembly of the State can either confer jurisdictional powers upon this Court nor abridge those which we possess as Courts of the United States.

Some minor procedural difficulties have been suggested. Some of this money is or was subject to the jurisdiction of the Court of Equity; some of the Admiralty Court, and some of the Bankruptcy Court. We see no importance in these distinctions of jurisdiction and of powers. However, the different funds were raised when they had been paid into the Registry of the Court or had been turned into the Treasury of the United States, the Act of Congress empowers the District Court to decree, on the application of a claimant to whom the moneys belong. This means title. Evidence that money is "escheatable" is no evidence that it has been escheated, and the State has no title until there has been an escheat. The State Statutes make this clear. The real position of the Petitioner is that the State Statutes have conferred jurisdiction upon no State Court to enter judgment to escheat these moneys but they have conferred it upon this Court. This they cannot do, and we in consequence have no such power. Our powers are those conferred by Congress and Congress has restricted us to awarding the fund to the one who has title to it. Congress has passed no general escheat Statute. The State has no title and no title by escheat can be acquired otherwise than by a compliance with those Statutes. When the Petitioner is able to show title to these moneys it will then be our duty to pass judgment upon the title set up. Then, but not until then, will the very interesting questions discussed arise. If we are now asked to award these

moneys to the State under the authority of the cited Acts of Congress, we answer that it empowers us to make the award only to those who prove title, and the State has as yet no title. If we are asked to confer title by entering a judgment of escheat in favor of the State and thus give it title, our answer is that we have no jurisdictional power to so do.

The prayers of the Petitioner are denied and the Petitions dismissed.

SUPREME COURT OF THE UNITED STATES.

No. 439.—October Term, 1937.

The United States of America, Appellant, *vs.* Philip Klein, Escheator of the Commonwealth of Pennsylvania.	Appeal from the Supreme Court of the State of Pennsylvania.

[February 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether statutes of the Commonwealth of Pennsylvania, Purdon's Penn. Statutes, Tit. 27, §§ 41, 45, 282, 334, are unconstitutional because they authorize interference with a federal court and an invasion of the sovereignty of the United States, in so far as they purport to confer jurisdiction on a state tribunal to declare the escheat of moneys deposited in the registry of the federal court and later covered into the Treasury of the United States.

In a suit brought by secured bondholders in the district court for eastern Pennsylvania to compel payment of the bonds by a defendant on the ground that it had appropriated the security to itself, a decree was entered in favor of the plaintiffs and other bondholders similarly situated, with provision for notice to the latter that they file their claims in the suit. *Brown* v. *Pennsylvania Canal Co.*, 229 Fed. 444; *Pennsylvania Canal Co.* v. *Brown*, 235 Fed. 669; *Brown* v. *Pennsylvania R. Co.*, 250 Fed. 513. It appearing that certain of the bondholders had not filed their claims and could not be found, the defendant was directed by the court to pay into its registry the money due to such bondholders, which was then placed in a designated despositary of the United States, in the name and to the credit of the court, pursuant to R. S. § 995, 28 U. S. C. § 851. On June 30, 1926, the fund was deposited in the Treasury of the United States as required by R. S. § 996, 28 U. S. C., § 852, in the case of funds paid into court and unclaimed for more than five years.

In 1934 the present appellee, as Escheator of the Commonwealth of Pennsylvania, proceeding under the Pennsylvania statutes which

authorize the escheat of moneys paid into court where the persons entitled to them have remained unknown for seven years, petitioned the district court to declare an escheat of the fund. The court dismissed the petition, without prejudice, on the grounds that appellee had not yet procured a declaration of escheat, which was deemed necessary in order to perfect the Commonwealth's title, and that the court was without jurisdiction to make such a declaration. Thereupon the Pennsylvania escheat statutes were amended, Act of June 28, 1935, P. L. 475, to confer upon the Court of Common Pleas jurisdiction to decree an escheat of moneys deposited in the custody or under the control of any court of the United States within the Commonwealth.[1]

The present suit was brought by appellee in the Court of Common Pleas, No. 5, of Philadelphia County, upon a petition setting out the facts already detailed and praying a declaration that the fund had escheated to the Commonwealth. The United States appeared in the suit and moved to dismiss the petition on the ground that the state court was without jurisdiction to escheat moneys in the custody of the United States or of its courts. The order of the Court of Common Pleas granting the motion was reversed by the Supreme Court of Pennsylvania, which held that the statutes relat-

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[1] As amended, the statutes provide:

"Sec. 41. . . . Whenever an escheat has occurred, or shall occur, of any money or property deposited in the custody of, or under the control of, any court of the United States in and for any district within this Commonwealth, or in the custody of any depository, clerk or other officer of such court, the court of common pleas of the county in which such court of the United States sits, shall have jurisdiction to ascertain if an escheat has occurred, and to enter a judgment or decree of escheat in favor of the Commonwealth.

"Sec. 282. . . . . After the owner, beneficial owner, or person entitled to any of the following named moneys or property, shall be and remain unknown, or the whereabouts thereof shall have been unknown, for the period of seven successive years, such moneys or property shall be escheatable to the Commonwealth, and shall be escheated in the manner hereinafter provided, with interest actually accrued thereon to the date of the decree for the escheat of the same, namely: . . .

"(b) Any moneys, estate, or effects paid into or deposited in any court of this Commonwealth, or in any Federal court in and for any district within the Commonwealth, or in the custody of any officer of any such court.

"Sec. 334. That whensoever any money, estate or effects, shall have been, or shall hereafter be paid into or deposited in the custody or be under the control of any court of this Commonwealth, or of any court of the United States in and for any district within this Commonwealth, or shall be in the custody of any depository, registry, or of any receiver, clerk, or other officer of any of said courts, and the rightful owner or owners thereof shall have been or shall be unknown for the space of seven years, the same shall escheat to the Commonwealth, subject to all legal demands on the same."

ing to escheat of funds in the custody of federal courts, conferred jurisdiction on the court to declare the escheat and was subject to no constitutional infirmity since exercise of that jurisdiction involved no interference with the federal court and no attempted control over funds in its custody. 322 Pa. 481.

The United States then filed an answer and upon a trial of the issues the Court of Common Pleas gave its decree declaring that the fund had escheated to the Commonwealth and that appellee had authority to claim it, and directing him to apply to the district court for an order that the moneys be paid to him as Escheator. The State Supreme Court affirmed so much of the decree as declared the escheat and authorized appellee to prosecute the claim of the Commonwealth to the moneys. 326 Pa. 260. From its decree of affirmance the case comes here on appeal under § 237 of the Judicial Code.

Section 996 of the Revised Statutes directs that when the right to moneys paid into federal courts has been adjudicated and they are unclaimed for more than five years, they shall be deposited in the Treasury of the United States, in the name of the United States. It further provides: "Any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received . . . and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders."[2]

The Government does not, in pleading or argument, set up any right, title or interest in the present fund adverse to the unknown bondholders. It does not contend that the fund has been or can be escheated to the United States. It agrees with the contention of

[2] The Permanent Appropriation Repeal Act, June 26, 1934, c. 756, 48 Stat. 1224, 1230, § 17, declares that appropriation accounts appearing on the books of the government, including "Unclaimed moneys of individuals whose whereabouts are unknown (Justice)", "are abolished and any unobligated balances under such accounts as of June 30, 1935, shall be covered into a trust fund receipt account in the Treasury to be designated 'Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown.' . . . There are authorized to be appropriated, annually, from such account such sums as may be necessary to meet any expenditures of the character now chargeable to the appropriation accounts abolished by this section. . . ."

appellee, which we accept as correctly interpreting the applicable federal statutes, that the fund remains subject to the order of the district court to be paid to the persons lawfully entitled to it upon proof of their ownership. But it insists here, as in the state courts, that the decree declaring the escheat is an unconstitutional interference with a court of the United States, an invasion of its sovereignty, and is an attempt, void under the Fourteenth Amendment, to exercise jurisdiction over the absent bondholders and the moneys, neither of which are shown to be within the state.

While a federal court which has taken possession of property in the exercise of the judicial power conferred upon it by the Constitution and laws of the United States is said to acquire exclusive jurisdiction, the jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189; see *Leadville Coal Co.* v. *McCreery,* 141 U. S. 475, 477. Other courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property. *Penn General Casualty Co.* v. *Pennsylvania, supra;* see *Heidritter* v. *Elizabeth Oilcloth Co.,* 112 U. S. 294, 304; cf. *Buck* v. *Colbath,* 3 Wall. 334, 342; *Riehle* v. *Margolies,* 279 U. S. 218. Similarly a federal court may make a like adjudication with respect to property in the possession of a state court. *Yonley* v. *Lavender,* 21 Wall. 276; *Byars* v. *McAuley,* 149 U. S. 608, 620; *Security Trust Co.* v. *Black River National Bank,* 187 U. S. 211, 227; *Waterman* v. *Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33, 43-46; *Commonwealth Trust Company* v. *Bradford,* 297 U. S. 613, 619; *General Baking Co.* v. *Harr,* 300 U. S. 433.

In this case jurisdiction was acquired by the district court, by reason of diversity of citizenship, to adjudicate the rights of the parties. That function performed, it now retains jurisdiction for the sole purpose of making disposition of the fund under its control, by ordering payment of it to the persons entitled as directed by the federal statute. Beyond whatever is needful and appropriate to the accomplishment of that end, the jurisdiction and possession of

he federal district court does not operate to curtail the power hich the state may constitutionally exercise over persons and roperty within its territory.

The present decree for escheat of the fund is not founded on ossession and does not disturb or purport to affect the Treasry's possession of the fund or the district court's authority ver it. Nor could it do so. *Penn General Casualty Co.* v. *Pennylvania, supra; United States* v. *Bank of New York & Trust Co.*, 96 U. S. 463, 478. At most the decree of the state court purports o be an adjudication upon the title of the unknown claimants in he fund by a proceeding in the nature of an inquest of office as n the case of escheated lands, compare *Security Savings Bank* v. *alifornia*, 263 U. S. 282, 287, with *Hamilton* v. *Brown*, 161 U. S. 56, 263, and to confirm the authority of appellee to make claim to he moneys. It is subordinate to every right asserted and decreed n the federal suit and effective only so far as it establishes rights erived from them. Neither the nature of the suit in the district ourt nor the federal statutes preclude transfer of or change in the nterest of the unknown claimants, either by judicial proceedings in he state court or otherwise, pending final disposition of the fund by he federal court. Section 996 of the Revised Statutes contemplates hat changes in ownership of the fund may occur, since it provides hat after the right to the fund has been finally adjudicated and it as been covered into the Treasury it shall be paid over to any peron entitled, upon full proof of his right to receive it.

Since the Government has not set up and does not assert any laim or interest in the fund apart from the possession acquired nder the decree of the district court and the statutes of the United tates, it is unnecessary to consider now the effect on the decree of he state court of the fund's absence from the state, and the absence r nonresidence of the unknown claimants, if such is the case. ll such questions will be open and may be raised and decided henever application is made to the district court for payment ver of the fund.

Affirmed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the nsideration or decision of this case.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 274

SAINT PAUL MERCURY INDEMNITY COMPANY,
PETITIONER,

vs.

RED CAB COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1937.

CERTIORARI GRANTED OCTOBER 18, 1937.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RECORD

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1 Pleas of the District Court of the United States for the Southern District of Indiana, at the United States Court House in the City of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court. Placita.

Red Cab Company
vs.
Saint Paul Mercury Indemnity Company
Myron S. Harlan
} 9743 Law.

Be It Remembered that heretofore towit: at the May Term of said Court on the 18th day of July, 1934, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above cause were had, to wit:

Comes now the defendant Saint Paul Mercury Indemnity Company by its solicitors and files transcript on removal from the Superior Court of Marion County, which transcript is as follows: (H. I.)

And said defendant by its solicitors Slaymaker, Merrell & Locke also files appearance, which is as follows: (H. I.)

1 Oct. 1, 34,

And afterwards towit at the May Term of said Court on the 1st day of October, 1934, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings, were had herein, towit:

Comes now the plaintiff by its solicitors and files motion to transfer to law side of docket, which motion is as follows:

2 743 L

IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana

Indianapolis Division

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, *Defendant.*
No. 1564 In Equity.

MOTION TO TRANSFER TO A LAW SIDE.

Filed Oct. 1, 1934, Albert C. Sogemeier, Clerk.

Comes now the plaintiff, Red Cab Company, and moves the Court to transfer this cause of action to the law side of the docket for the following reasons:

The facts set forth in the Amended Complaint which has been filed herein charge a breach of contract for which damages are asked and thus a court of law has jurisdiction and the plaintiff is entitled to a jury under the Statutes and Constitution of the United States.

Wherefore, plaintiff prays that the above entitled cause of action be transferred to the law side of the Court and for all other proper relief.

RYAN AND RUCKELSHAUS,
By JOHN K. RUCKELSHAUS,
(*Attorneys for Plaintiff*)

3 And afterwards to wit: at the November Term of said Court on the 10th day of November, 1934, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit: Filed Nov 1934.

Comes now the plaintiff, by its solicitors, and pending defendant Insurance Company's motion to make amended complaint more specific and, by leave of Court files second amended complaint for breach of contract and damages, which second amended complaint is as follows:

4 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Captain) * *

SECOND AMENDED COMPLAINT FOR BREACH OF CONTRACT AND FOR DAMAGES.

Filed Nov. 10, 1934, Albert C. Sogemeier, Clerk.

Comes now the plaintiff, and for cause of action against the defendant says:

That the plaintiff is a corporation organized under the laws of the State of Indiana, with its office and principal place of business in the City of Indianapolis, Indiana; that the plaintiff was at all times herein mentioned engaged in the taxicab business within the limits of the City of Indianapolis, Indiana; that in connection with such business the plaintiff operates and maintains certain automobiles used in connection with its taxicab business; that the plaintiff likewise for the purpose of carrying on and conducting such taxicab business did employ at all times herein mentioned a large number of drivers and other persons necessary for the operation of such business.

That the defendant, Saint Paul Mercury Indemnity Company, is a foreign corporation; that such corporation is qualified for the purpose of doing business within the State of Indiana, and is engaged in such state in the general insurance business; that among the lines of insurance written by such defendant corporation was at all times herein mentioned, Workmen's Compensation Insurance.

5 That on or about the 30th day of December, 1933, the plaintiff had elected and was operating under the provisions of the Indiana Workmen's Compensation Act, and pursuant thereto entered into a contract of insurance with the

defendant corporation whereby it was provided that the defendant corporation would insure the plaintiff against loss or expense that might be suffered by reason of claims for Workmen's Compensation during a period of thirty (30) days from the 30th day of December, 1933, and the defendant corporation did on or about December 30th, 1933, deliver to the plaintiff a binder containing the terms of such contract of insurance, which binder is attached hereto, made a part of this complaint and marked Exhibit "A"; that the defendant corporation did likewise agree with this plaintiff in connection with such contract of insurance to take all necessary steps on behalf of the plaintiff, including the filing of reports and notices, that are required of employers who are operating under the provisions of the Workmen's Compensation Act of the State of Indiana, that the practice of an insurance company filing on behalf of its assured in the case of a Workmen's Compensation contract of insurance, evidence of insurance and all necessary notices and papers with the Industrial Board of Indiana, as are required by law of employers operating under such Workmen's Compensation Act, was at all times herein mentioned an established custom and usage of the insurance trade and business.

That the plaintiff has performed all things that it was required to perform in connection with such contract of insurance, but the defendant corporation has wholly failed and refused to perform its part of such contract and has breached said contract of insurance as hereinafter specified.

That thereafter during such thirty (30) day period when such contract of insurance was in full force and effect,
6 ten (10) of the employees engaged in the business of driving the plaintiff's taxicabs, suffered injury during the course of their employment and made claim against this plaintiff in connection with such injuries, a description of which injuries and amount required to be paid in connection therewith for each of such employees is set forth in "Exhibit B," which is attached hereto and made a part of this complaint; that the plaintiff notified the defendant corporation of each of such accidents and the defendant corporation through its duly authorized representatives did make certain investigations in connection with such claims for compensation; that on or about the 3rd day of February, 1934, after the expiration of such contract of insurance, the defendant corporation did first notify this plaintiff that the defendant corporation had elected not to pay or recognize any of such claims for compensation insurance made by the employees of

the Red Cab Company during the period ending thirty (30) days from the 30th day of December, 1933; further, that the defendant corporation did notify the plaintiff at such time that such defendant corporation denied liability to the plaintiff for any responsibility in connection with the terms of its contract of insurance heretofore issued; that the defendant corporation neglected and refused to file with the Industrial Board of Indiana notice on behalf of the plaintiff of evidence by compliance with the insurance provisions of the Indiana Workmen's Compensation Act, and, further, the defendant corporation neglected and refused to file on behalf of such plaintiff notice of injury to employees, as required by law; that this plaintiff had no notice whatsoever that defendant corporation had so failed to file such notices until after the expiration of the thirty (30) days period covered by the insurance contract in question; that the defendant corporation's refusal to comply with the terms of its contract of insurance, as set forth above, was in direct violation of such contract and as a direct and proximate result thereof, this plaintiff has suffered great and irreparable damage as hereinafter specified.

7 That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistants for the purpose of investigating and satisfying claims made by its employees during the thirty (30) day period from December 30th, 1933, covered by the defendant corporation's contract of insurance, as described in "Exhibit B"; that, furthermore, the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's written contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical, hospital and dental bills in connection with the injuries suffered by such employees, as described in "Exhibit B", all to its damage in the sum of Four Thousand Dollars ($4,000.00).

Wherefore, the plaintiff demands judgment against the defendant, Saint Paul Mercury Indemnity Company, in the amount of Four Thousand Dollars ($4,000.00), and for all other proper relief in the premises.

RYAN AND RUCKELSHAUS,
By JOHN K. RUCKELSHAUS,
Attorneys for Plaintiff.

8 EXHIBIT "A".

Binder

December 30th, 1933

St. Paul Mercury Indemnity Co.....Insurance Company of St. Paul, Minn., at its Indpls, Ind. Agency agrees to bind for a period of 30 days from 12 o'clock noon of said date, insurance as follows:

Assured ____ Red Cap Company ____
Property to be covered ____ Workmen's Compensation ____
Location of property—739 East Market St., Indianapolis, Ind.
Amount $ Open____ Rate tariff____ Map Sheet____ Block____

This binder to continue in force until replaced by regular policy (but in no event for a longer period than____ days), and shall be subject to all the terms and conditions of the regular policy of said company, but it may be cancelled by notice to the assured or his agent placing the insurance; the termination of the liability hereunder to be effective from 12 o'clock noon standard time, next subsequent to such notice.

MYRON S. HARLAN
Agent

202
(Rough Notes Form No. 324)

9

EXHIBIT "B".

LIST OF EMPLOYEES OF RED CAB COMPANY INJURED AND AMOUNT OF COMPENSATION REQUESTED TO BE PAID IN CONNECTION WITH SUCH INJURIES, INCLUDING LIST OF OTHER EXPENSES INCURRED IN CONNECTION WITH SUCH COMPENSATION CLAIMS.

Name of Injured	Date of Injury	Nature of Injury	Amount paid or indebtedness incurred
Harold Jegen	Jan. 6, 1934	Lacerations anterior surface, right wrist, and over dorsum, 1st metacarpel. Indianapolis Industrial Clinic	$ 11.00
J. F. O'Brien	Jan. 8, 1934	Injury to nose and left mastoid area. Indianapolis Industrial Clinic	4.00
John Vannostrand	Jan. 9, 1934	Both wrists and left side of face burned. Indianapolis Industrial Clinic	6.35
Carl Wall	Jan. 13, 1934	Laceration tip right thumb. Indianapolis Industrial Clinic	2.00
Marion England	Jan. 18, 1934	Wrenched knee and twisted back, necessitating operation on knee joint. Judgment and costs in favor of Marion F. England, Marion Superior Court, Room No. 4., Cause No. A-77504	556.50
Russell Roberts	Jan. 23, 1934	Right ankle sprained. Indianapolis Industrial Clinic	2.00
Claude Hill	Jan. 23, 1934	Hernia strangulation. Indianapolis Indust. Clinic $105.00 Methodist Hospital 78.25 Compensation 41.50	224.75
Wm. L. Chapman	Jan. 24, 1934	Right eye injured by object being lodged in right lower lid. Indianapolis Industrial Clinic	3.00

10 (EXHIBIT "B" CONTINUED)

Name of Injured	Date of Injury	Nature of Injury	Amount paid or indebtedness incurred
		Carried forward	$809.60
Reuben K. Barnes	Jan. 24, 1934	Cut on back of left ear. Cut on lower lip. Contusion of chest. Front teeth of upper jaw knocked loose, filling of one of molars, together with the outer shell of tooth knocked out, which molar is located on the right side of the upper jaw.	
		Indianapolis Industrial Clinic	$7.00
		Dr. Will H. Smith, Jr. Dentist	25.00
		Compensation to Reuben K. Barnes	6.29
		City Hospital charges	6.00
		Total	$ 44.29
Joe Hopkins	Jan. 28, 1934	Right hand injured. Injury to right thenar eminence.	
		Indianapolis Industrial Clinic	2.00
		Employment of investigator to investigate claims with respect to the above accidents	25.00
		Employment of attorneys to investigate and represent Red Cab Co. with respect to claims, including preparation of legal documents and representation in connection with court action as indicated above	500.00
		TOTAL	$1380.89

Filed Dec. 26, 1934.

11 And afterwards to wit: at the November Term of said Court on the 26th day of December, 1934, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective solicitors and the motion of the defendant, Saint Paul Mercury Indemnity Company, to require plaintiff to separate its second amended complaint into paragraphs is now submitted to the Court, and the Court being duly advised orders that said motion be and the same is hereby overruled, to which ruling of the Court said defendant excepts.

And the plaintiff's motion to transfer this cause to the law side of the docket is also submitted to the Court, and the Court being duly advised orders that said motion be and the same is hereby sustained, and orders that this cause be transferred to

the law side of the docket, which is now done under number 9743 Law.

Comes now the plaintiff, by its attorney, and moves the court to dismiss the plaintiff's cause as to the defendant, Myron S. Harlan; in consideration whereof it is by the court ordered that this cause be, and the same now is, dismissed as to the said defendant, Myron S. Harlan, and it is ordered that the said Myron S. Harlan have and recover his costs herein from the said plaintiff, taxed at ..... dollars and ..... cents.

All of which is ordered by the court.

12 And afterwards to wit: at the November Term of said Court, on the 24th day of January, 1935, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit: Filed Jan 1935.

Come now the defendants, by their attorneys, and file demurrer to plaintiff's second amended complaint, which demurrer is as follows:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

DEMURRER TO PLAINTIFF'S SECOND AMENDED COMPLAINT.

Comes now the defendant in the above entitled cause, by its attorneys, and demurs to the second amended complaint of the plaintiff herein and for cause of demurrer the said defendant says:

That said second amended complaint of the plaintiff herein does not state facts sufficient to constitute a cause of action.

This defendant files herewith, attaches hereto and makes part hereof its memorandum marked Exhibit "A".

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant.

14 EXHIBIT "A"—MEMORANDUM.

For its memorandum with the annexed and foregoing demurrer and as a part thereof, the defendant respectfully shows the court that the plaintiff in this action sues upon a

writing consisting of a binder of Workmen's Compensation insurance alleged by the plaintiff to have been executed to it.

The writing sued on states in very definite and precise language that:

"This binder * * * shall be subject to all the terms and conditions of the regular policy of said company".

Very clearly then the writing sued on refers to another paper and makes the terms and conditions of such other paper a part of the writing sued on but the second amended complaint does not incorporate or exhibit the writing referred to nor state the substance of the conditions and terms thereof, or any excuse for not averring such terms and conditions, if any excuse could be alleged. Manifestly the complaint omits to state the terms of the contract sued on or the conditions of the contract sued on, so that the plaintiff sues upon a fragment merely and less than the whole of the contract alleged by the plaintiff itself to have been entered between the plaintiff and the defendant. Such a complaint is clearly demurrable.

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant.

Defendant asks an exception if its demurrer be not sustained.

BURKE G. SLAYMAKER.

15 And afterwards to wit: at the November Term of said Court on the 13th day of March, 1935, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to wit:

Come now the parties by their respective attorneys, and the defendant's demurrer to the plaintiff's second amended complaint, is now submitted to the Court, and the Court being duly advised, orders that said demurrer be and the same is hereby overruled, to which ruling of the Court said defendant excepts.

16 And afterwards to wit: at the November Term of said Court on the 6th day of April, 1935, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit: Filed Apr 1935.

Comes now the defendant, Saint Paul Mercury Indemnity Company, by its attorneys, and files answer to plaintiff's second amended complaint, which answer is as follows:

17 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

ANSWER OF DEFENDANT TO PLAINTIFF'S SECOND AMENDED COMPLAINT.

Paragraph I.

Now comes the defendant Saint Paul Mercury Indemnity Company, by its attorneys, and for its first paragraph of answer to the second amended complaint of the plaintiff herein, this defendant says:

That said defendant denies each and every allegation contained in the said second amended complaint of the plaintiff herein.

18 Paragraph II.

Again comes the above named defendant Saint Paul Mercury Indemnity Company, by its attorneys, and for its second and further paragraph of answer to the second amended complaint of the plaintiff herein, this defendant says:

That the said binder in writing sued on in said second amended complaint, a copy of which said binder is filed with said second amended complaint made part thereof and marked Exhibit "A", stated and provided and therein and thereby the plaintiff and this defendant agreed that said binder may be cancelled by this defendant by notice to the plaintiff or the agent of the plaintiff placing the insurance evidenced by said binder and that upon such notice the termination of the liability of this defendant under said binder should be effective from 12 o'clock Noon Standard Time next subsequent to the giving of such notice by this defendant.

That said insurance was placed with this defendant, and said written binder was procured from this defendant, by the

plaintiff by one C. E. Waggoner as agent for and on behalf of plaintiff, and not otherwise.

This defendant avers that before the occurrence of the injuries, losses, damages and liabilities alleged and sued for in said second amended complaint and before the occurrence of any thereof and before any injury had been suffered by any workman, employee or other representative of said plaintiff, this defendant pursuant to and in conformity with the
19 terms of said binder in writing, elected to cancel and did cancel and terminate said binder and did give notice in writing to the said plaintiff and to the agent of the plaintiff who placed said insurance evidenced by said binder, that said binder in writing was cancelled and the liability of this defendant thereunder was terminated which said notice was received by the plaintiff and said agent of the plaintiff who placed said insurance for plaintiff with this defendant, before 12 o'clock Noon Standard Time of the 5th day of January, 1934; that the termination of the liability of said defendant under and because of said binder became effective and the same was by this defendant cancelled on and before 12 o'clock Noon Standard Time of the 5th day of January, 1934, pursuant to the terms of said binder in writing and this defendant avers that said binder was not in force or effect in the whole or in any part, at the time of the occurrence of the losses, damage, injuries, accidents and liabilities or any of them, mentioned in said second amended complaint herein.

Defendant avers that one C. E. Waggoner of the City of Indianapolis, Indiana was, when and after said binder agreement was entered into between the plaintiff and the defendant, the agent of the plaintiff for the purpose of procuring from this defendant the said binder and the placing with this defendant of said insurance, and said C. E. Waggoner did, as agent for the said plaintiff, procure from this defendant the said binder and for said plaintiff did place said insurance with this defendant, and that then and thereafter and during and throughout the month of January, 1934 the said C. E.
20 Waggoner was the agent for the plaintiff, and by the plaintiff and for it was duly authorized to do all, every and singular of the matters and things that the plaintiff itself might or could do respecting said insurance, including the procuring, modification, continuing, replacing, termination and cancellation of the said binder contract and the receiving and accepting of notice of the cancellation and termination thereof.

This defendant avers that on, to-wit, the 3rd day of January, 1934 this defendant, by one Myron S. Harlan, who was

then and there the agent of this defendant and by the defendant thereunto duly authorized, in this behalf wrote, addressed and dispatched a letter in writing to plaintiff addressed to said C. E. Waggoner at Indianapolis, Indiana, as the agent for the plaintiff, relating to said binder, by which said letter this defendant, acting by and through the said Myron S. Harlan, notified the said C. E. Waggoner as the agent of and for and on behalf of the plaintiff and as the agent of the plaintiff who for plaintiff procured from this defendant the said binder alleged and sued on in this action and who as agent for plaintiff placed said insurance with this defendant, that this defendant elected to cancel and terminate and did cancel and terminate said binder and that said binder would terminate and become cancelled and of no further effect pursuant to such notice and pursuant to the terms of said binder, which said letter in writing was on, to-wit, the 4th day of January, 1934, received by the said plaintiff and by said C. E. Waggoner as agent for and on the behalf of the said plaintiff and as the agent of the plaintiff who procured said insurance for the plaintiff evidenced by said binder and who as agent for plaintiff placed said insurance with this defendant. Defend-
21 ant avers that said letter is in the words and figures, substantially, following, to-wit:

"January 3rd, 1934.

Mr. C. E. Waggoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.
Dear Sir:

Re: Red Cab Company.

We regret to be compelled to advise that as per understanding we submitted this risk to the St. Paul Mercury Indemnity Company and also the National Casualty Company, both of whom we represent, and have a declination from each of the institutions.

Unfortunately, we do not have any other facilities for handling this class of business.

We are returning herewith the payroll report statement which you left as a guide for submission.

Regretting our inability to serve you, however, thanking you for the opportunity, we beg to remain,

Yours very truly,

MYRON S. HARLAN."

MSH:T
Enclosure.

And the defendant further avers that on, to-wit, the 4th day of January, 1934 the said defendant acting by and through one Myron S. Harlan as its agent wrote, addressed and dispatched to the said C. E. Waggoner as the agent for and on the behalf of the plaintiff and as the agent of the plaintiff who, for the plaintiff, and as plaintiff's agent,
22 procured from defendant and placed with defendant for plaintiff the insurance evidenced by the said binder sued on in this action, the letter in writing of the defendant again advising the plaintiff and the said C. E. Waggoner as such agent of the plaintiff of the cancellation and termination by this defendant of said binder sued on in this action, which said letter is, substantially, in the words and figures following, to-wit:

"January 4th, 1934.

Mr. C. E. Waggoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.
Dear Sir:

Re: Red Cab Company.

Will you kindly return to us the binders given you in connection with the above captioned, and oblige.

Yours very truly,
MYRON S. HARLAN."

MSH:T

That both and each of said letters were subscribed by Myron S. Harlan and in his name but for and on behalf and as the agent in that behalf, of this defendant, as plaintiff and said C. E. Waggoner then and there well knew, and the plaintiff and the said C. E. Waggoner on the receipt of said letters and each of them knew and understood that they were addressed to the said plaintiff and to the said C. E. Waggoner as the agent aforesaid of the said plaintiff by the said Myron S. Harlan as the agent of this defendant and not other-
23 wise; that both and each of said letters foregoing were so dispatched by United States mails by this defendant acting by and through said Myron S. Harlan, and both and each thereof were, before 12 o'clock Noon Standard Time of the 5th day of January, 1934, received by the said plaintiff and by the said C. E. Waggoner as the agent of the said plaintiff and as the agent who for the plaintiff procured the said insurance evidenced by the binder sued on in this action,

and who as agent for plaintiff placed said insurance with this defendant.

That both and each of said letters were so dispatched by this defendant by the said Myron S. Harlan as its agent as aforesaid by United States mails and were received by the said plaintiff and by said C. E. Waggoner as such agent as aforesaid for the said plaintiff, by United States mails before 12 o'clock Noon Standard Time of the 5th day of January, 1934, and before the occurrence of the losses and injuries and any of the losses and injuries alleged by the plaintiff in its said second amended complaint.

This defendant avers that the said plaintiff never paid or caused to be paid and never gave or caused to be given to this defendant, and this defendant has not had or received, any premium, monies or other thing of value for, because or on account of said binder in writing or the insurance evidenced thereby.

Defendant avers that all things whatsoever that were done by, for and on the behalf of the said plaintiff in the placing or in or about the placing of the said insurance evidenced by said binder and in and about the obtaining for the plain-
24 tiff from the defendant of said binder in writing, were done by the said C. E. Waggoner and no one else, and that this defendant dealt with the said plaintiff in any and every matter respecting the said insurance and the said binder only, solely and exclusively with the said C. E. Waggoner on plaintiff's behalf and that this defendant neither met nor knew any other person or persons whomsoever in and about said business as the agent or representative of said plaintiff than the said C. E. Waggoner, and that the said C. E. Waggoner was at the times hereinbefore alleged the person mentioned and referred to in the said binder in writing as the agent of the plaintiff placing said insurance, and said C. E. Waggoner was, at all times mentioned herein, duly authorized for and on behalf of said plaintiff to accept notice for and on behalf of the plaintiff of the cancellation and termination of said binder and of the insurance evidenced thereby, and was the person designated in said binder as the person authorized to receive, on plaintiff's behalf, and to whom, on plaintiff's behalf, notice of cancellation of said binder could and should be given by this defendant, said C. E. Waggoner being the person designated by the following language, to-wit:

"his agent placing the insurance"

appearing on said binder sued on.

And this defendant now and hereby refers to said Exhibit "A" filed with and made a part of said second amended complaint and by this reference makes the same a part hereof as fully as if set forth at length herein.

25 Wherefore, having fully answered, this defendant says it should go acquit with its costs herein.

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant, Saint Paul Mercury Indemnity Company.

Apr. 25, 26 And afterwards to wit: at the November Term of said Court, on the 25th day of April, 1935, Before the Honorable Robert C. Blatzell, Judge of said Court, the following further proceedings were had herein to wit:

Comes now the plaintiff, by its attorneys, and files answer in general denial to second paragraph of defendants' answer, which is as follows:

27 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

ANSWER IN GENERAL DENIAL TO SECOND PARAGRAPH OF DEFENDANT'S ANSWER.

Comes now the plaintiff, Red Cab Company, and denies each and every material allegation of the defendant's second paragraph of answer in the above entitled cause of action.

RYAN AND RUCKELSHAUS,
By JOHN K. RUCKELSHAUS,
Attorneys for Plaintiff.

22 Nov. 1935. 28 And afterwards to wit: at the November Term of said Court on the 22nd day of November, 1935, Before the Honorable Robert C. Baltzell, Judge of said Court the following further proceedings were had herein to wit:

Come now the parties, by their respective attorneys, and come also the persons drawn and summoned as petit jurors in this Court, and they are severally examined as to their competency for trial of this cause, and this cause coming on

now to be tried, here comes a jury, to wit: Newel H. Stewart, J. D. Bolender, Walter Chapple, Harry W. Cochran, Fielding Colbert, John T. Dixon, Ray Hornaday, Albert Howe, Earl Long, Altus H. Newson, John Peters, and John Bunnell, who are duly impaneled and sworn, and the evidence is heard in part.

Now after the trial of this cause has been entered upon and a part of the evidence has been heard this day the parties in open court file herein a written waiver of jury and in writing consent that this cause be tried by the court without a jury.

At the same time the parties to this cause, by their attorneys, request the court to set aside the submission of this cause to the jury and ask the court to continue this cause to a day certain later to be determined by the court.

In consideration whereof it is by the court ordered that the submission of this cause to the jury be, and the same is now hereby, set aside and that all of the evidence heretofore offered in this cause be considered as evidence offered on the trial of the cause before the court without a jury, and a jury is now waived upon the written stipulation of the parties herein; and the parties now request the court to make a special finding of facts and conclusions of law and file the same herein, which the court now consents to do; and this cause is now continued,

29 (Further entry for November 22, 1935)

the trial whereof to be resumed at a day later to be fixed by the court.

All of which is ordered by the court.

30 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

WAIVER OF JURY.

The parties to the above entitled cause hereby agree that a jury shall be dispensed with on the trial of this cause and that this cause be tried by the court, without a jury, and request that the court make and file a special findings of fact and conclusions of law.

RUCKELSHAUS AND RUCKELSHAUS,
JOHN K. RUCKELSHAUS,
Attorneys for Plaintiff.

B. G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant.

31 And afterwards to wit: at the May Term of said Court on the 19th day of June, 1936, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

The defendant comes and files herein its written request for conclusions of law to be made and stated by the court upon the special findings of facts to be made by the court herein. Said Written request of the defendant for special conclusions of law upon the special findings of fact are now considered by the court and the court does now refuse to make all and any of the said conclusions of law required in writing by the defendant to be made and stated by the court upon the special findings of facts herein. Said conclusions of law so requested by the defendant are by the defendant numbered First, Second, Third, Fourth and Fifth; and the said defendant now excepts to the action of the court in refusing to make and state its said requested conclusions of law, and each of them, and excepts jointly and severally as to each and all of said requested conclusions of law, which said request foregoing by said defendant for special conclusions of law is as follows:

(Further entry for June 19, 1936)

June 19, 36 And now the court, having been requested by both and each of the parties hereto before the trial of the case was entered upon, to make, state, sign and file herein special findings of facts and conclusions of law, and the court having agreed so to do, does now, pursuant to the said request of the parties hereto, make, state, subscribe and file herein the following special findings of fact and conclusions of law thereon, to-wit:

37 COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the District Court of the United States.

* * (Caption) * *

The Court having been requested by the plaintiff and by the defendant before the trial of this cause was entered upon, to make, sign and file herein special findings of facts and conclusions of law thereon, the Court, pursuant to such re-

quests, does now find, make, state and file herein the following special findings of facts and conclusions of law herein, to-wit:

Special Findings of Facts.

1. That the plaintiff is a corporation organized and existing by virtue of the laws of the State of Indiana with its principal office at Indianapolis in said State, and is a citizen and resident of the State of Indiana; that the plaintiff has been engaged in a general taxicab business in the City of Indianapolis, Indiana, for a period of more than five years prior to December, 1935; that the plaintiff maintains and operates certain automobiles which are used in its taxicab business; that the plaintiff likewise, for the purpose of carrying on and conducting such taxicab business, did employ, in December 1933 and January 1934, a large number of drivers and other persons necessary for the operation of its said business.

38 2. That the defendant, Saint Paul Mercury Indemnity Company, is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota and is a citizen and resident of the State of Minnesota; with its office and principal place of business at the City of Saint Paul, in said State; that the defendant is duly admitted to the State of Indiana for the purpose of doing business within the State of Indiana as a casualty insurance company and is engaged in such State in such business; that among the lines of insurance written by such defendant corporation in the years 1933 and 1934 was Workmen's Compensation Insurance.

3. That the plaintiff sometime prior to December 1, 1933, had elected to operate under the provisions of the Indiana Workmen's Compensation Act and during the months of December, 1933, and January, 1934, was so operating.

4. That a short time prior to December 30, 1933, the plaintiff requested one Clifford E. Wagoner, who was an insurance broker with offices in the City of Indianapolis, Indiana, to procure for the plaintiff an insurance policy covering plaintiff's Workmen's Compensation losses; that said Clifford E. Wagoner, pursuant to such request, on December 30, 1933, did procure from the defendant's duly authorized agent, one Myron S. Harlan, whose office was likewise in the City of

Indianapolis, Indiana, a written binder contract in the words and figures following:

Binder.

December 30th, 1933.

St. Paul Mercury Indemnity Co. _____
Insurance Company of St. Paul, Minn. at its Indpls. Ind. Agency agrees to bind for a period of 30 days from 12 o'clock noon of said date, insurance as follows:

Assured—Red Cab Company.

39 Property to be covered—Workmen's Compensation.
Location of Property—739 East Market St., Indianapolis, Ind.

Amount $ Open—Rate tariff—Map Sheet— Block.....

This binder to continue in force until replaced by regular policy (but in no event for a longer period than ..... days), and shall be subject to all the terms and conditions of the regular policy of said company, but it may be cancelled by notice to the assured or his agent placing the insurance; the termination of the liability hereunder to be effective from 12 o'clock noon standard time, next subsequent to such notice.

MYRON S. HARLAN,
Agent.

202
(Rough Notes Form No. 324)

5. That said written binder contract of insurance referred to above was delivered by said Myron S. Harlan on behalf of the defendant to said Clifford E. Wagoner, on December 30, 1933, who in turn delivered said binder to the plaintiff; that said binder was the only contract delivered by the defendant to the plaintiff, and no regular policy or any policy of said defendant was ever executed or delivered by the defendant or any agent of it to the plaintiff or said Clifford E. Wagoner, or anyone else.

6. That it was the established custom and usage of the insurance trade and business in the State of Indiana at the time referred to herein to issue a binder contract of insurance and later, in the event that the insurer elected, to issue a regular policy of insurance which would supercede such binder contract.

7. That plaintiff mailed to the defendant, its check in the amount of $215.61, intended by plaintiff as the premium owing from plaintiff to defendant in connection with such binder contract of Workmen's Compensation Insurance,

which such check the defendant returned to the plaintiff during the month of February, 1934, with the defendant's letter to the plaintiff dated February 16, 1934.

8. That between the 6th day of January, 1934, and the 28th day of January, 1934, ten (10) of the employees
40 engaged in the business of driving the plaintiff's taxicabs, suffered injury during the course of their employment and made claim against the plaintiff by reason of such injuries, which injuries, including a list of expenses incurred by the plaintiff in connection with such compensation claims, are as follows:

LIST OF EMPLOYEES OF RED CAB COMPANY INJURED AND AMOUNT OF COMPENSATION REQUESTED TO BE PAID IN CONNECTION WITH SUCH INJURIES, INCLUDING LIST OF OTHER EXPENSES INCURRED IN CONNECTION WITH SUCH COMPENSATION CLAIMS.

Name of Injured	Date of Injury	Nature of Injury	Amount paid or indebtedness incurred
Harold Jegen	Jan. 6, 1934	Lacerations anterior surface, right wrist and over dorsum, 1st metacarpel.	
		Indianapolis Industrial Clinic	$ 11.00
J. F. O'Brien	Jan. 8, 1934	Injury to nose and left mastoid area.	
		Indianapolis Industrial Clinic	4.00
John Vannostrand	Jan. 9, 1934	Both wrists and left side of face burned.	
		Indianapolis Industrial Clinic	6.35
Carl Wall	Jan. 13, 1934	Laceration tip right thumb.	
		Indianapolis Industrial Clinic	2.00
Marion England	Jan. 18, 1934	Wrenched knee and twisted back, necessitating operation on knee joint. Judgment and costs in favor of Marion F. England, Marion Superior Court, Room No. 4., Cause No. A-77504	556.50
Russell Roberts	Jan. 23, 1934	Right ankle sprained.	
		Indianapolis Industrial Clinic	2.00
Claude Hill	Jan. 23, 1934	Hernia strangulation.	
		Indianapolis Indust. Clinic	$105.00
		Methodist Hospital	78.25
		Compensation	41.50
			224.75
41 Wm. L. Chapman	Jan. 24, 1934	Right eye injured by object being lodged in right lower lid.	
		Indianapolis Industrial Clinic	3.00

Name of Injured	Date of Injury	Nature of Injury	Amount paid or indebtedness incurred
Reuben K. Barnes	Jan. 24, 1934	Cut on back of left ear. Cut on lower lip. Contusion of chest. Front teeth of upper jaw knocked loose, filling of one of molars, together with the outer shell of tooth knocked out, which molar is located on the right side of the upper jaw.	
		Indianapolis Industrial Clinic	$7.00
		Dr. Will H. Smith, Jr. Dentist	25.00
		Compensation to Reuben K. Barnes	6.29
		City Hospital charges	6.00
		Total	$ 44.29
Joe Hopkins	Jan. 28, 1934	Right hand injured. Injury to right thenar eminence.	
		Indianapolis Industrial Clinic	2.00
Employment of investigator to investigate claims with respect to the above accidents			25.00
Employment of attorneys to investigate and represent Red Cab Co. with respect to claims, including preparation of legal documents and representation in connection with court action as indicated above			350.00
Interest			147.70
		TOTAL	$1378.59

9. That the plaintiff notified the defendant corporation of each of the accidents referred to above. The defendant, by its attorney, made certain investigations in connection with such claims for compensation. Thereafter, during the month of February, the defendant, through its attorney, notified the plaintiff that the defendant denied liability in connection with such claims and that its action in investigating the same should not be construed as a waiver of any defense that the defendant might have in connection with such
42 binder contract of insurance.

10. That the amounts referred to above for employees' compensation and expenses incurred in connection therewith by the plaintiff were fair and reasonable charges under the circumstances. That such amounts specified above have been paid out by the plaintiff or such indebtedness has been incurred by the plaintiff therefor in connection with the claims of employees injured in the course of their employment dur-

ing the period extending from January 6, 1934, to January 28, 1934.

11. That the defendant has denied liability in connection with all of such claims and has refused to pay to the plaintiff any of the amounts referred to herein, which amounts represent claims made or expenses incurred as a result of injuries to employees of the plaintiff as specified above; that no amount of money whatsoever has been paid by the defendant to the plaintiff or any of its employees referred to herein in connection with the claims of employees or expenses of the plaintiff listed above.

12. That said Myron S. Harlan, above herein referred to, was at all times mentioned herein the duly commissioned and licensed agent of the defendant at Indianapolis, Indiana, and authorized for defendant to effect contracts of Workmen's Compensation insurance on defendant's behalf and to give notice and effect the cancellation of same on defendant's behalf.

13. That the binder contract of insurance sued on herein by the plaintiff was procured for the plaintiff by said Clifford E. Wagoner, and said Clifford E. Wagoner alone acted for the plaintiff in the procuring and receiving from the defendant of the said binder contract of insurance sued on in this action.

14. That the said Clifford E. Wagoner was authorized and empowered by the plaintiff and for and on behalf of
43 the plaintiff to procure, receive and accept from the defendant said written binder contract of insurance.

15. On January 3, 1934, said Myron S. Harlan, as Agent of and for the defendant, wrote, addressed and mailed to the said Clifford E. Wagoner a letter in the words and figures following, to-wit:

"January 3, 1934.

Mr. C. E. Wagoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.

Dear Sir: Re: Red Cab Company

We regret to be compelled to advise that as per understanding we submitted this risk to the St. Paul Mercury Indemnity Company and also the National Casualty Company, both of whom we represent, and have a declination from each of the institutions.

Unfortunately, we do not have any other facilities for handling this class of business.

We are returning herewith the payroll report statement which you left as a guide for submission.

Regrettng our inability to serve, however, thanking you for the opportunity we beg to remain,

Very truly yours,

MYRON S. HARLAN

MSH:T
Enclosure."

Said letter was received by the said Clifford E. Wagoner at his office in Indianapolis, Indiana, in the forenoon of January 4, 1936, and before the hour of twelve o'clock noon Standard Time of that day.

16. That said Clifford E. Wagoner, after receipt of the letter dated January 3, 1934, from Myron S. Harlan, set
44 forth in paragraph 15 herein, communicated by letter with Myron S. Harlan, which letter notified said Myron S. Harlan that Clifford E. Wagoner had interpreted Harlan's letter of January 3, 1934 as a refusal to issue a regular policy of insurance by the defendant and not as a cancellation of the binder contract of insurance; that neither the plaintiff nor Clifford E. Wagoner received from Myron S. Harlan or the defendant during the 30 day period from December 30, 1933, any correspondence other than Harlan's letter of January 3, 1934, set forth in paragraph 15 herein.

17. On January 4, 1933, the aforesaid Myron S. Harlan, for the defendant, wrote and deposited in the Unite States mails at Indianapolis, Indiana, addressed to the said Clifford E. Wagoner, a letter relating to the binder contract here involved, which letter is in the words and figures following, to-wit:

"January 4th, 1933.

Mr. C. E. Wagoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.

Dear Sir: Re: Red Cab Company.

Will you kindly return to us the binder given you in connection with the above captioned, and oblige.

Yours very truly,

MSH:T MYRON S. HARLAN."

The said Wagoner denies that he received or ever saw said letter.

June 19, 1936

ROBERT C. BALTZELL,
Judge.

45 Conclusions of Law.

Upon the foregoing facts, the court does now make, state and file herein the following several conclusions of law herein:

1. That said Clifford E. Wagoner was the agent of the plaintiff for the purpose of notice to the plaintiff from the defendant of the cancellation of said written binder contract sued on herein and is the person intended and referred to by the parties hereto by the words "or his agent placing the insurance", appearing in said binder contract.

2. That the defendant's aforesaid letter subscribed by said Myron S. Harlan, dated January 3, 1934, and received by said Clifford E. Wagoner on January 4, 1934, did not constitute a notice of cancellation of such binder contract of insurance.

3. The law in this case is with the plaintiff.

4. The plaintiff is entitled to recover from the defendant the sum of Eleven Hundred Sixty-Two Dollars and ninety-eight Cents (1162.98).

Subscribed and dated at Indianapolis, Indiana, this 19th day of June, 1936.

ROBERT C. BALTZELL,
Judge, United States District Court for the Southern District of Indiana.

46 (Further entry for June 19, 1936)

Entered J
19, 1936

And the said defendant now at the same time excepts to the court's conclusions of law, numbered One, Two, Three and Four and to each thereof, separately and severally.

And now the defendant again requests the court to make, state and file herein the defendant's written conclusions of law heretofore in writing requested by the defendant numbered First, Second, Third, Fourth and Fifth, and each thereof separately, which said requested conclusions of law, and each of them, the court refuses to make, state or adopt as the court's conclusions of law herein, and the defendant

now excepts to the action of the court jointly and severally to make, state and adopt the defendant's said written requested conclusions of law and each thereof, numbered as aforesaid, First, Second, Third, Fourth and Fifth.

And now, come the parties by their attorneys, and the court now gives and renders judgment on the special findings of fact and conclusions of law heretofore made, signed and filed herein, in consideration whereof,

It Is Ordered And Adjudged by the court that the plaintiff have and recover of and from the defendant the sum of One Thousand One Hundred Sixty-two Dollars and Ninety-eight Cents (1,162,98), together with its costs herein, laid out and expended, taxed at the sum of $_____ Dollars and _____ Cents.

of Excep- ns filed pt. 1, 1936.

58 (Further entry for September 1, 1936)

And the defendant also files bill of exceptions, which has been signed and approved by the court and is as follows:

59 In the District Court of the United States.

* * (Caption) * *

DEFENDANT'S BILL OF EXCEPTIONS.

Filed at Sep 1 1936 M Albert C. Sogemeier, Clerk

Be It Remembered, that in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, at the United States Court House in the City of Indianapolis, Indiana, on the 19th day of June, 1936, the following proceedings were had in the above entitled cause before the Honorable Robert C. Baltzell, Judge of said court:

The above cause being at issue and having come on for trial before the court without the intervention of a jury upon the written waiver of the parties hereto of a trial by jury, the evidence was heard and the court was requested to and agreed to make a special finding of fact herein and to state conclusions of law thereon and to file the same herein, and the evidence on the trial of said cause having been heard by the court and the taking of evidence concluded, and the cause being under advisement by the court now on the 19th day of June, 1936, the defendant, Saint Paul Mercury Indemnity Company, comes and files herein and presents to the

court the said defendant's request by its motion in writing for certain declarations of law herein by the making and stating of conclusions of law on the special findings of fact herein, which said motion in writing of the said defendant is in the words and figures following, to-wit:

60 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

The defendant, before the making, stating and filing by the court of its special findings of fact herein and conclusions of law thereon, and any or either thereof, requests and moves the court to make and state each and all of the following several conclusions of law on the special findings of facts herein—

First: That the defendant's letter in writing dated January 3, 1934, subscribed and despatched on defendant's behalf to Clifford E. Wagoner and by said Wagoner received on January 4, 1934, was a good and sufficient notice from the defendant to the plaintiff of the cancellation of the written binder contract sued on in this action.

Second: That the written binder contract sued on in this action was cancelled by the defendant, pursuant to its terms, on January 4, 1934, and at the hour of twelve o'clock noon Standard Time of said day.

Third: That said Clifford E. Wagoner was constituted by plaintiff the agent of plaintiff to accept notice on plaintiff's behalf on January 4, 1934, of the cancellation of said written binder contract sued on herein.

61 Fourth: That the written binder contract sued on in this action was not in force when the injuries and any of the injuries to the plaintiff's employees, involved in this action, occurred.

Fifth: The law in this action is with the defendant.

The defendant requests an exception separately as to each and every of the foregoing requested conclusions of law if they or any of them shall be refused by the court.

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant.

ate of

And now, I, Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, do hereby certify the annexed and foregoing transcript as tendered to me by the defendant, Saint Paul Mercury Indemnity Company, on the 1st
65 day of September, 1936, as a true bill of exceptions in said cause; that I have examined the same and find the same to be full, true, complete and correct and to contain the said defendant's request for declarations of law in this cause as conclusions of law on the special findings of fact made by the defendant herein, the ruling of the court upon such request and the exceptions of said defendant to the ruling of the court thereon, and that the same should be signed, filed and settled as a true bill of exceptions herein, which is accordingly this day done; and it is now by the court ordered that the said bill of exceptions shall be filed with the clerk of the court in the office of the clerk of the court as a true bill of exceptions in the above entitled cause, and that same shall be and become and now is a part of the record in this cause.

In Witness Whereof, I have hereunto subscribed my name at the City of Indianapolis in said District, this 1st day of September, 1936.

ROBERT C. BALTZELL,
Judge of the District Court of the United States for the Southern District of Indiana.

Sept. 1,

47 And afterwards to wit: at the May Term of said Court on the 1st day of September, 1936, Before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Comes now the defendant, by its attorneys, and files petition for appeal, and also files assignment of errors, which are respectively as follows:

48 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

DEFENDANT'S PETITION FOR APPEAL.

The above named defendant, Saint Paul Mercury Indemnity Company, defendant in the above entitled cause, feeling

itself aggrieved by the judgment against it heretofore given, rendered and entered in favor of the plaintiff, Red Cab Company, in the above entitled cause, on the 19th day of June, 1936, does hereby pray an appeal from said final judgment to the United States Circuit Court of Appeals for the Seventh Circuit, upon and for each and every of the grounds, reasons and causes set forth in said defendant's joint and several assignment of errors filed herewith; and the said defendant prays that its said appeal be allowed; that a citation be issued as provided by law; that an order be made fixing the security which this defendant shall give upon such appeal as a supersedeas and that upon the giving of such security by this defendant all further proceedings to enforce an execution of said judgment pending such appeal be suspended; that the duly authenticated transcript of the papers, proceedings and record herein upon which said judgment was given, rendered and entered, be transmitted forthwith to the said United States Circuit Court of Appeals for the Seventh Circuit; and the said defendant prays that all further proper orders relating to the appeal herein prayed for be duly made and entered in the form and manner by law provided,
49 all as under the rules of such court in such case made and provided.

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant,
Saint Paul Mercury Indemnity Company.

50 IN THE DISTRICT COURT OF THE UNITED STATES.

Filed Sept. 1936.

* * (Caption) * *

ASSIGNMENT OF ERRORS.

Comes now Saint Paul Mercury Indemnity Company, defendant in the above entitled cause, and shows that in the proceedings, record and judgment in the above entitled cause, manifest errors were committed to the prejudice of said defendant, in all and each separately of the following particulars, to-wit:

1. The District Court erred in refusing to make the declarations of law requested by this defendant by its requested conclusions of law numbered First, Second, Third, Fourth and Fifth, and each thereof, upon the special findings of fact of the court made and filed herein, to which ruling and action of the court the defendant at the time, by its attorneys, ex-

cepted as to all and each separately of the said requested declarations and conclusions of law.

2. The District Court erred in its conclusions of law numbered One, Two, Three and Four, and each thereof, upon the special findings of fact made and filed by the court herein to all and each of which said conclusions of law numbered One, Two, Three and Four this defendant at the time, by its attorneys, excepted.

3. The facts found and stated by the District Court in its special findings of fact made and filed herein do not support and are not sufficient to sustain the judgment of the
51 District Court rendered herein in the favor of the plaintiff.

4. The District Court erred in rendering a judgment herein for the plaintiff because the facts found and stated by the court in its special findings of fact made and filed herein show that the contract sued on by the plaintiff in this action was cancelled, terminated and ceased to be in force at the time of the occurrence of all, each and every of the losses of the plaintiff alleged in the second amended complaint and sued for by the plaintiff herein.

5. The District Court erred in giving and rendering a judgment herein for the plaintiff because the facts found and stated by the court in its special findings of fact herein do not support and fail to sustain the said judgment of the court herein, and the law is with the defendant upon the said special findings of fact because said special findings of fact do not sustain the material allegations of the second amended complaint of the plaintiff herein.

6. The District Court erred in overruling the demurrer of this defendant to the second amended complaint of the plaintiff.

Wherefore, the said defendant prays that the final judgment of the District Court herein be reversed and it asks for all other proper relief.

BURKE G. SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant, Saint Paul Mercury Indemnity Company.

52 (Further entry for September 1, 1936.) Entered 1936.

And thereupon it is ordered that the prayer of said petition for appeal be, and the same is hereby allowed, upon the filing of an appeal bond in the sum of One Thousand Five Hundred Dollars ($1,500.00) with good and sufficient surety thereon, to be approved by the Court.

And the defendant now files his appeal bond in the sum of One Thousand Five Hundred Dollars ($1,500.00) with the Inland Bonding Company as surety thereon, which bond is approved by the Court and is as follows:

53 IN THE DISTRICT COURT OF THE UNITED STATES. Filed S 1936.

* * (Caption) * *

Know All Men By These Presents That we, Saint Paul Mercury Indemnity Company, a corporation, with its office and principal place of business in the City of Saint Paul, State of Minnesota, as principal, and Inland Bonding Company, a corporation, with its office and principal place of business in the City of South Bend, State of Indiana, as surety, are held and firmly bound unto Red Cab Company, plaintiff in the above entitled cause, in the penal sum of Fifteen Hundred Dollars ($1,500.00) for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly, by these presents.

Subscribed and sealed this 1st day of September, A. D. 1936.

54 The condition of this obligation is such that whereas on the 19th day of June, 1936, in the District Court of the United States for the Southern District of Indiana, Indianapolis Division, in a suit pending in said court wherein said Red Cab Company is plaintiff and said Saint Paul Mercury Indemnity Company is defendant a judgment was entered in favor of said Red Cab Company against said Saint Paul Mercury Indemnity Company in the sum of $1,162.98, together with the costs of said Red Cab Company in said action, and the said Saint Paul Mercury Indemnity Company has obtained an appeal and supersedeas from the said court in the aforesaid cause and a citation directed to the said Red Cab Company citing and admonishing said Red Cab Company to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago, in the State

of Illinois, thirty days from and after the date of said citation: now the condition of the above obligation is such that if the said Saint Paul Mercury Indemnity Company shall prosecute such appeal with effect and answer all damages and costs, if it shall fail to make good its appeal plea, then the above obligation to be void and of no effect, otherwise to remain in full force and virtue.

SAINT PAUL MERCURY INDEMNITY COMPANY,
By BURKE G. SLAYMAKER,
Its Attorney,
Principal.

INLAND BONDING COMPANY,
By H. L. BARR,
Its Attorney in Fact,
Surety.

(Bonding Company Seal)
Approved: Sept. 1, 1936.

ROBERT C. BALTZELL,
Judge United States District Court.

66 (Further entry for September 1, 1936.)

And the defendant also files praecipe for transcript, which praecipe is as follows:

Sept. 1, 1936. 67 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the District Court of the United States for the Southern District of Indiana, Indianapolis Division:

The defendant in the above entitled cause requests you forthwith to prepare, seal and certify according to law for the use of the defendant on its appeal from the final judgment in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Circuit, the transcript of the record in said cause, including in said transcript, the following:

1. This praecipe.

4. The motion of the plaintiff to transfer this cause from the Equity Docket numbered 156 thereon, to the Common Law Docket of this Court, together with the entry and the filing of said motion and entry and order made by the court thereon ordering such transfer.

68 5. The second amended complaint of the plaintiff and the entry of the filing of the same.

6. The order docketing this cause as No. 9743 on the law docket in this court.

7. Demurrer of this defendant to the second amended complaint, the entry of the filing of the same, and the entry and order overruling the same with the exception thereon to this defendant.

8. The answer of the defendant to the second amended complaint and the entry of the filing of the same.

9. The reply of the plaintiff and the entry of the filing of the same.

10. The written waiver of trial by jury of this cause.

11. The order and entry dated November 22, 1935, of the submission of this cause for trial by jury, setting aside of such submission and the filing of written waiver of jury, the complete entry of all orders and proceedings on November 22, 1935, and at any and every time thereafter.

12. This defendant's bill of exceptions, the certificate of the Judge thereto and the order of the court approving the same.

13. This defendant's request for special conclusions of law on the special findings of fact herein.

14. The judgment for the plaintiff herein including the special findings of fact and conclusions of law and entry.

15. This defendant's petition for appeal.

16. This defendant's assignment of errors.

17. Order allowing appeal fixing and approving the security therefor.

18. This defendant's appeal bond.

19. Citation and proof of service thereof.

69 20. All entries of the above mentioned papers or orders, the action and rulings of the court thereon, and all exceptions to the ruling of the court.

BURKE SLAYMAKER,
SLAYMAKER, MERRELL & LOCKE,
Attorneys for Defendant, Saint Paul Mercury Indemnity Company.

Service of the above praecipe and receipt of a copy thereof are hereby acknowledged by the plaintiff this 1st day of September, 1936.

RED CAB COMPANY,
By JOHN K. RUCKELSHAUS,
Its Attorney.

70 United States of America,
Southern District of Indiana, } ss.
Indianapolis Division.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript of the record and proceedings in the cause of Red Cab Company *vs.* Saint Paul Mercury Indemnity Company, No. 9743, At Law, according to the praecipe filed September 1, 1936, now remaining among the records of said Court in my office.

I further certify that the original Bill of Exceptions and the original Citation have been incorporated into said transcript.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, this 15th day of September, 1936.

ALBERT C. SOGEMEIER,
(Seal) *Clerk, United States District Court,*
Southern District of Indiana.

55 (Further entry for September 1, 1936.)

And the defendant also files citation, which citation is as follows:

56 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

CITATION.

Filed Sep 1 1936 Albert C. Sogemeier, Clerk.

To Red Cab Company, Plaintiff in the Above Entitled Cause, Greetings:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago, within thirty (30) days after the date hereof, pursuant to an order allowing an appeal filed in the office of the clerk of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, from its final judgment in a suit wherein Saint Paul Mercury

Indemnity Company is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Robert C. Baltzell, Judge of the District Court of the United States for the Southern District of Indiana, this 1st day of September in the year of Our Lord, One Thousand Nine Hundred Thirty Six.

ROBERT C. BALTZELL,
Judge.

57 The above named Red Cab Company hereby accepts service of the above and foregoing citation and a true copy thereof, this 1st day of September, 1936.

RED CAB COMPANY,
By JOHN K. RUCKELSHAUS,
Its Attorney.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 37, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the sixteenth day of October, 1936, upon which the following entitled cause was heard and determined:

Saint Paul Mercury Indemnity Company,
Appellant,

vs.

Red Cab Company,
Appellee,

No. 6033, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of July, A. D. 1937.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord, one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Saint Paul Mercury Indemnity Company, 6033 *vs.* Red Cab Company.	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

And, to-wit: On the twenty-fourth day of September, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6033. October Term 1935.

Saint Paul Mercury Indemnity Company,

vs.

Red Cab Company.

The Clerk will enter my appearance as counsel for appellant.

Burke G. Slaymaker,
Consolidated Building,
Indianapolis, Indiana.

Endorsed: Filed September 24, 1936. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1936, of the October Term, in the year of our Lord one thousand nine hundred and thirty-six, and of our Independence the one hundred and sixty-first.

And afterwards, to-wit: On the nineteenth day of October, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6033. October Term, 1936.

Saint Paul Mercury Indemnity Company,

vs.

Red Cab Company.

The Clerk will enter my appearance as counsel for appellee.

John K. Ruckelshaus,
Railway Exchange Bldg.,
Indianapolis, Indiana.

Endorsed: Filed October 19, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-fourth day of February, 1937, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 24, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

6033	Saint Paul Mercury Indemnity Company, *vs.* Red Cab Company.	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Burke G. Slaymaker, counsel for appellant, and by Mr. John K. Ruckelshaus, counsel for appellee, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the twelfth day of April, 1937, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

ed Apr. 12, 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6033. October Term, 1936, January Session, 1937.

SAINT PAUL MERCURY INDEMNITY COMPANY, *Appellant,*
vs.
RED CAB COMPANY, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

April 12, 1937.

Before EVANS, *Circuit Judge,* and LINDLEY and BRIGGLE, *District Judges.*

EVANS, *Circuit Judge.* This appeal is from a judgment for $1,162.98 predicated on a thirty day insurance binder. Appellee sought protection for itself and its cab drivers. The so-called insurance binder covered workmen's compensation risks.

Appellant denied liability because of the alleged cancellation of the binder agreement. The binder in question was executed on December 30, 1933, by appellant's agent, Harlan, and provided for thirty day Workmen's Compensation insurance by appellant of appellee's employees. It provided for cancellation of the binder by notice to insured's agent. It also provided the binder was subject to all the terms of the regular policy.

Harlan, appellant's agent, wrote to one Waggoner, an insurance broker whom the District Court found to have been employed by appellee to procure said insurance, on January 3, 1934, a letter which is the basis of the asserted cancellation wherein it is stated that appellant had declined to assume the risk.

Appellee paid the premium on the binder, amounting to $215.61, which check was returned in the middle of February.

It is also claimed that Harlan wrote Waggoner on January 4th requesting the return of the binder, but Waggoner denies receipt of the letter. We accept as true the statement that the letter was not received.

In favor of a reversal it is argued: (1) Liability under the insurance binder was terminated upon the receipt of the letter of cancellation addressed to appellee's broker, who, in fact and law, was also appellee's agent. (2) Inasmuch as the insurance binder expressly provides that it should be subject to all the terms and conditions of the regular policy, the judgment is not sustainable because the terms of the policy are nowhere set forth in the pleadings nor their substance found in any special findings of the court.

Appellee argues: (1) No cancellation of the binder was effected because of the vague character of the notice which must be construed in favor of the insured. (2) The special findings of the trial court are not reviewable on appeal where no exception was taken to them and where the evidence on which the findings were based is not before the court.

Unfortunately the instant case must be reversed with directions to the District Court to remand the action for want of Federal court jurisdiction. The case is governed by the two recent decisions, *McNutt* v. *General Motors,* 298 U. S. 178, and *KVOS* v. *Associated Press,* 299 U. S. 269.

Federal court jurisdiction of this action is dependent upon the allegation and showing of more than $3,000 in controversy. The damage allegations of the complaint are as follows:

> "That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistants for the purpose of investigating and satisfying claims made by its employees during the thirty (30) day period from December 30th, 1933, covered by the defendant corporation's contract of insurance, as described in 'Exhibit B'; that, furthermore, the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's written contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical, hospital and dental bills in connection with the injuries suffered by such employees,

as described in 'Exhibit B', all to its damage in the sum of Four Thousand Dollars ($4,000.00)."

Exhibit B, attached to the complaint and made a part of it, sets forth in detail the damages which were claimed by appellee. It is headed: "List of Employees of Red Cab Company Injured and Amount of Compensation Requested to be Paid in connection with such Injuries, including List of other expenses incurred in connection with such Compensation Claims." The statement includes the names of injured employees, the amounts paid for damages, for doctors and hospital charges, as well as all amounts paid for investigators and attorneys' fees, incurred in resisting such claims. The total is $1,380.89. The court entered judgment for plaintiff for $1,162.98.

It thus affirmatively appears that the amount in controversy was less than $3,000. The court cannot close its eyes to the obvious, nor go ahead with the trial of a cause of which it has no jurisdiction—even though, as here, both parties were desirous of having it try the cause.

The judgment is reversed with directions to the District Court to remand the same to the state court of the State of Indiana wherein it was begun. The costs of removal and remanding shall be borne by appellant. Each side will pay its own costs in this court.

Endorsed: Filed April 12, 1937. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twelfth day of April, 1937, the following further proceedings were had and entered of record, to-wit:

Monday, April 12, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

6033	Saint Paul Mercury Indemnity Company, *vs.* Red Cab Company.	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to remand the same to the State Court of the State of Indiana, wherein it was begun, and that the costs of removal and remanding shall be borne by appellant.

It is further ordered that each side pay its own costs in this court.

And afterwards, to-wit: On the twenty-fourth day of April, 1937, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And on the same day, to-wit: On the twenty-fourth day of April, 1937, there was filed in the office of the Clerk of this court, a Notice of Petition, and Petition for Writ of Certiorari for Diminution of Record, which said Notice and Petition are in the words and figures following, to-wit:

No. 6033.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Saint Paul Mercury Indemnity Company, *Appellant,*
vs.
Red Cab Company, *Appellee.*

Appealed from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

To the Appellee, Red Cab Company, and its Attorneys of Record in the Above Cause:

Take notice that on the 24th day of April, 1937, the appellant will file in the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause the said appellant's verified motion for a writ of certiorari for diminution of the record in the above cause, a copy of which said motion is filed herewith, attached hereto and made a part hereof; and notice is hereby given that said motion will be presented to the said court on said day, or as soon thereafter as counsel can be heard.

Dated this 23rd day of April, A. D. 1937.

Burke G. Slaymaker,
Seymour, Merrell & Locke,
Attorneys for Appellant.

Due and sufficient service of the foregoing notice and of a copy thereof and of the said petition for a writ of certiorari thereto annexed is acknowledged this 23rd day of April, 1937, by the appellee, Red Cab Company.

Dated at Indianapolis, Indiana, this 23rd day of April, 1937.

John K. Ruckelshaus,
Ruckelshaus & Ruckelshaus,
Attorneys for Appellee, Red Cab Company.

No. 6033.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Saint Paul Mercury Indemnity Company, *Appellant,*
vs.
Red Cab Company, *Appellee.*

Appealed from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

PETITION FOR CERTIORARI FOR DIMINUTION OF THE RECORD.

The appellant, Saint Paul Mercury Indemnity Company, comes by its attorneys and moves the court for a writ of certiorari to the Clerk of the Disrict Court of the United States for the Southern District of Indiana, Indianapolis Division, because of a diminution of the record of the said District Court in the said cause in which the judgment here appealed from was rendered in this: that this court issue its writ of certiorari to the said Clerk of the said District Court commanding him to make, seal, certify and transmit to this court a full, true, complete and correct copy of the transcript on removal of this cause from the Superior Court of Marion County, Room 3, in and for the County of Marion and State of Indiana, from which said state court this cause was removed by the appellant to the said District Court.

Said transcript on removal will clearly show that the said District Court had jurisdiction of this cause and that this honorable court has jurisdiction of this appeal.

The said transcript on removal shows and states that on June 5, 1934, the said Red Cab Company, as plaintiff, commenced the action in the said Superior Court by filing therein its complaint against appellant and one Myron S. Harlan, the agent of the defendant, in which said complaint the said Red Cab Company alleged that said Red Cab Company was entitled to recover from this appellant unliquidated damages in the sum of $4,000.00, because of the breach of the contract therein set forth, being the binder set forth in the special

findings of fact and in the second amended complaint in this cause in this court.

Appellant states that the particular averment of said complaint filed and on file in said state court on the subject of damages, at the time of said removal, was in the words and figures following, to-wit:

> "That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistance for the purpose of investigating and satisfying claims made by its employees during the thirty day period from December thirtieth (30) 1933, covered by the defendant corporation's contract of insurance; that furthermore the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical, hospital and dental bills in connection with the injuries suffered by such employees, all to its damage in the sum of Four Thousand Dollars ($4,000.00.)"

The prayer of the said Red Cab Company in said complaint in said state court at the time of said removal was in the words and figures following, to-wit:

> "Wherefore the plaintiff demands judgment against the defendant, Saint Paul Mercury Indemnity Company, in the amount of Four Thousand Dollars ($4,000.00) and for all other proper relief in the premises, and prays that this court will upon hearing issue a temporary injunction refraining the defendant, Myron S. Harlan, from transferring out of his possession to the defendant, Saint Paul Mercury Indemnity Company, any money that may now or hereafter be in the possession of the defendant, Myron S. Harlan, as agent of the defendant, Saint Paul Mercury Indemnity Company, pending final outcome of this cause of action."

Appellant avers that there was no bill of particulars filed with said complaint in said state court and that there was no other or different averment respecting the amount of the loss and damage the plaintiff alleged it had suffered and which it sought to recover from this appellant; that said complaint in said state court was verified upon the behalf of the

said plaintiff by the oath of one Thomas R. Kackley, the Treasurer of the said Red Cab Company.

That while said complaint of the said Red Cab Company so filed and on file in said state court alleged the said Red Cab Company's unliquidated damages to be in the sum of $4,000.00 and demanded recovery from this appellant of the said sum of $4,000.00 and all other proper relief, this appellant, within the time allowed by law, filed in said state court and presented to the judge thereof the appellant's petition for the removal of said cause to the said District Court, together with its bond payable to the plaintiff, in the penal sum of One Thousand Dollars ($1,000.00), conditioned as by law required. Notice of said petition and bond and a copy of both thereof were duly served on the said Red Cab Company; that proof of the service of said notice and of a copy of said petition and bond on the said Red Cab Company before said petition and bond were filed was filed by appellant in said state court and presented to the judge thereof; that said state court and the judge thereof ordered said cause removed to the said District Court, and the transcript of said complaint, petition for removal, bond, notice, proof of service, and of the entire record of said state court in said cause, duly signed, sealed and certified by the Clerk thereof, was by the appellant duly filed in the office of the Clerk of the said District Court on July 18, 1934, on which said day this cause was duly docketed in the said District Court as No. 1564 on the Equity docket thereof; that all the proceedings aforesaid were in due form of law, and within the time and order by law required.

That appellant's said petition for removal was duly verified, and averred that the amount in controversy in said action exceeded, exclusive of interest and costs, the sum of $3,000.00; that said petition showed and averred complete diversity of citizenship between the said Red Cab Company and of this appellant, in this, that the said Red Cab Company was a corporation organized and existing under and pursuant to the laws of the State of Indiana and that it was a resident and citizen of the State of Indiana, and that the appellant was a corporation organized and existing under and pursuant to the laws of the State of Minnesota, and was a citizen and resident of the State of Minnesota and a non-resident of the State of Indiana; and said petition averred that the said Myron S. Harlan in truth and in fact had no interest in this action and that he was, by the plaintiff, joined as a defendant

for the fraudulent purpose and intent to defeat the removal by this appellant of this cause to the said District Court; and said petition further averred that there was a separable controversy between the said appellant and the said appellee, and said petition showed and alleged a separable controversy between the said appellant, on one side, and the said appellee, on the other side, and that the said Myron S. Harlan was not interested in said controversy between the appellant and the appellee.

Appellant further shows the court that the transcript of the record already before this court shows that the said Red Cab Company afterwards moved said District Court to dismiss its said action as to the said Myron S. Harland and that the said District Court duly entered its order dismissing the plaintiff's action herein against the said Myron S. Harlan long before this cause was heard and before judgment herein was rendered by the said District Court.

Appellant states and shows to the court that this court has jurisdiction of this appeal and that said District Court had jurisdiction of said cause, as will fully appear by said transcript on removal.

Appellant states and shows to the court that said transcript on removal was not certified or requested to be certified to this court originally because it was the opinion of counsel for the appellant, and of counsel for the appellee, that it was not necessary to incorporate said transcript on removal into the transcript of this court for the purpose to show jurisdiction, inasmuch as the second amended complaint upon which this case was tried, and which was certified to this court, demanded the recovery of $4,000.00 from this appellant, notwithstanding the bill of particulars filed therewith stated the amount of the plaintiff's claim to be less than $3,000.00.

Appellant states and shows to the court that the appellant and the appellee have in good faith presented their claims to this court in the belief that the transcript before this court showed jurisdiction of the court below and of this honorable court.

Inasmuch as appellant and appellee have fully briefed and orally argued this cause on its merits before this court, and inasmuch as the said District Court and this honorable court both and each, in law and fact, have jurisdiction of this cause, as will fully appear by the said transcript on removal, the

appellant prays that this honorable court now issue its writ of certiorari to the Clerk of the said District Court commanding him to certify to this court the said transcript on removal.

This honorable court, not having before it said transcript on removal, gave its judgment on April 12, 1937, that this cause should be remanded to the District Court and by the District Court remanded to the state court, because the record before this court did not show that there was involved in this court the amount necessary to give this court federal jurisdiction.

The appellant has filed its petition for a rehearing in this cause on the jurisdictional question, and the said writ of certiorari is sought by the said appellant in aid of this appellant's petition for a rehearing, to the end that this court shall be enabled to decide this case on its merits and as a case within the jurisdiction of this court as the case is within the jurisdiction of this court, as appellant verily believes.

Since the plaintiff sought the recovery of unliquidated damages by his complaint in the state court, alleged to be in the sum of $4,000.00, upon which complaint and the petition for removal in reliance thereon the said cause was removed to the said District Court, the jurisdiction of the federal court was not lost by the second amended complaint and the bill of particulars thereafter filed reducing the amount in controversy.

The authorities showing jurisdiction to exist in this case, in view of the facts set forth in the transcript on removal, are collected and reviewed and the question discussed in the appellant's petition for a rehearing herein, now on file, to which petition the appellant now refers.

And appellant will ever pray.

Burke G. Slaymaker,
Slaymaker, Merrell & Locke,
Attorneys for Appellant.

State of Indiana, }
Marion County. } ss.

Burke G. Slaymaker, being duly sworn, upon his oath deposes and says:

That he is one of the attorneys, and the attorney of record, for the appellant in the above entitled cause; that he has read the annexed and foregoing petition for certiorari for

diminution of the record in the above entitled cause and knows the contents thereof and that he makes this verification on behalf of the said appellant; and affiant says that the facts on which the said petition for said writ are founded and set forth in said petition are true.

Burke G. Slaymaker.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for said County and State, this 23rd day of April, A. D. 1937.

Witness my hand and Notarial seal.

Reta M. Halsey,
Notary Public.

My commission expires: April 25, 1940.

Endorsed: Filed April 24, 1937. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-seventh day of April, 1937, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 27, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

6033	Saint Paul Mercury Indemnity Company *vs.* Red Cab Company.	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the court that the petition of appellant for a writ of certiorari for diminution of the record in this cause be, and the same is hereby granted; and that a writ of certiorari issue to the District Court of the United States for the Southern District of Indiana, Indianapolis Division, as prayed in said petition.

And on the same day, to-wit: On the twenty-seventh day of April, 1937, a Writ of Certiorari for Diminution of the Record issued to the District Court of the United States for the Southern District of Indiana, Indianapolis Division, which said Writ is not copied here as the same is set out in full with the Return to the Writ of Certiorari, immediately following.

And afterwards, to-wit: On the thirtieth day of April, 1937, there was filed in the office of the Clerk of this court, the Return to the Writ of Certiorari for Diminution of the Record, which said Writ and Return are in the words and figures following, to-wit:

United States of America, }
Seventh Judicial Circuit. } ss.

The President of the United States of America, to the Judges of the District Court of the United States for the Southern District of Indiana, Indianapolis Division, Greeting:

Whereas, in a certain suit in said District Court, between Red Cab Company, Plaintiff, and Saint Paul Mercury Indemnity Company, Defendant, No. 9743, which suit was removed to the United States Circuit Court of Appeals for the Seventh Circuit by virtue of an appeal, agreeably to Act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"The transcript of proceeding on removal of this cause from the Superior Court of Marion County, Indiana, Room 3, to the District Court of the United States for the Southern District of Indiana, Indianapolis Division."

You, therefore, are commanded that, searching the records and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said United States Circuit Court of Appeals for the Seventh Circuit, so that you have the same, together with this writ before the said United States Circuit Court of Appeals forthwith.

Witness, The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, this Twenty-seventh day of April, A. D. 1937.

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

RETURN TO WRIT OF CERTIORARI.

In obedience to this Writ, I herewith certify and transmit to the United States Circuit Court of Appeals for the Seventh Circuit, the following:

Transcript of proceedings on removal from the Superior Court of Marion County, Indiana, Room 3, to the District Court of the United States for the Southern District of Indiana, Indianapolis Division, filed in my office on July 18, 1934, in the cause of Red Cab Company *vs.* Saint Paul Mercury Indemnity Company, No. 9743 Law.

Witness my hand and the seal of said Court at Indianapolis, Indiana, this 29th day of April, 1937.

Albert C. Sogemeier,
(Seal) *Clerk U. S. District Court Southern District of Indiana.*

Be It Remembered, that among and as a part of the record of the Superior Court, Marion County, State of Indiana, is the following in the cause of:

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan, *Defendants.*
} Cause No. A-77718

Room 3

Comes now the plaintiff by counsel, June 5, 1934, and files complaint in the office of the clerk of said court, which complaint is in the words and figures following:

State of Indiana, } ss.
County of Marion. }

IN SUPERIOR COURT OF MARION COUNTY.

Room _____

Red Cab Company, *Plaintiff*,
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan. } No. 1564 Eq.

Comes now the plaintiff, and for cause of action against the defendant says:

That the plaintiff is a corporation organized under the laws of the State of Indiana, with its office and principal place of business in the City of Indianapolis, Indiana; that the plaintiff was at all times herein mentioned engaged in the taxicab business within the limits of the City of Indianapolis, Indiana; that in connection with such business the plaintiff operates and maintains certain automobiles used in connection with its taxicab business; that the plaintiff likewise for the purpose of carrying on and conducting such taxicab business did employ at all times herein mentioned a large number of drivers and other persons necessary for the operation of such business.

That the defendant, Saint Paul Mercury Indemnity Company, is a foreign corporation; that such corporation is qualified for the purpose of doing business within the State of Indiana, and is engaged in such state in the general insurance business; that among the lines of insurance written by such defendant corporation was at all times herein mentioned Workmen's Compensation Insurance.

That on or about the 30th day of December, 1933, the plaintiff had elected and was operating under the provisions of the Indiana Workmen's Compensation Act, and pursuant thereto entered into a contract of insurance with the defendant corporation whereby it was provided that the defendant corporation would insure the plaintiff against any loss or expense that might be suffered by reason of claims for Workmen's Compensation during a period of thirty (30) days from the 30th day of December, 1933, and the defendant corpora-

tion did on or about December 30th, 1933, deliver to the plaintiff a binder containing the terms of such contract of insurance, which binder is attached hereto, made a part of this complaint and marked Exhibit "A"; that the defendant corporation did likewise agree with this plaintiff in connection with such contract of insurance to take all necessary steps on behalf of the plaintiff, including the filing of reports and notices, that are required of employers who are operating under the provisions of the Workmen's Compensation Act of the State of Indiana, that the practice of an insuance company filing on behalf of its assured in the case of a Workmen's Compensation contract of insurance, evidence of insurance and all necessary notices and papers with the Industrial Board of Indiana, as are required by law of employers operating under such Workmen's Compensation Act, was at all times herein mentioned an established custom and usage of the insurance trade and business.

That the plaintiff has performed all things that it was required to perform in connection with such contract of insurance, but the defendant corporation has wholly failed and refused to perform its part of such contract and has breached said contract of insurance as hereinafter specified.

That thereafter during such thirty (30) day period when such contract of insurance was in full force and effect, certain of the employes of plaintiff suffered injury during the course of their employment and made claim against this plaintiff in connection with such injuries; that the plaintiff notified the defendant corporation of each of such accidents and the defendant corporation through its duly authorized representative did make certain investigations in connection with such claims for compensation; that on or about the 3rd day of February, 1934, after the expiration of such contract of insurance, the defendant corporation did first notify this plaintiff that the defendant corporation had elected not to pay or recognize any of such claims for compensation insurance made by the employes of the Red Cab Company during the period ending thirty (30) days from the 30th day of December, 1933; further, that the defendant corporation did notify the plaintiff at such time that such defendant corporation denied liability to the plaintiff for any responsibility in connection with the terms of its contract of insurance heretofore issued; that the defendant corporation neglected and refused to file with the Industrial Board of Indiana notice on behalf of the plaintiff of evidence of compliance with the insurance provisions

of the Indiana Workmen's Compensation Act, and, further, the defendant corporation neglected and refused to file on behalf of such plaintiff notice of injury to employees, as required by law; that this plaintiff had no notice whatsoever that defendant corporation had so failed to file such notices until after the expiration of the thirty (30) day period covered by the insurance contract in question; that the defendant corporation's refusal to comply with the terms of its contract of insurance, as set forth above, was in direct violation of such contract and as a direct and proximate result thereof, this plaintiff has suffered great and irreparable damage as hereinafter specified.

That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistants for the purpose of investigating and satisfying claim made by its employees during the thirty (30) day period from December 30th, 1933, covered by the defendant corporation's contract of insurance; that, furthermore, the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's written contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical hospital and dental bills in connection with the injuries suffered by such employees, all to its damage in the sum of Four Thousand Dollars ($4,000.00).

That the defendant Myron S. Harlan is an insurance broker with his principal office in the City of Indianapolis, Indiana; that from time to time the defendant, Myron S. Harlan, acts and has acted at all times herein mentioned as the representative and agent for the defendant corporation in the writing of insurance contracts, including Workmen's Compensation Insurance; that the defendant, Myron S. Harlan, did execute on behalf of the defendant corporation a policy of Workmen's Compensation Insurance with this plaintiff, as is described herein; that the defendant Myron S. Harlan, as representative of the defendant corporation in the State of Indiana, is obligated in accordance with the laws of such state to retain in his possession all monies belonging to such defendant corporation which may now or hereafter come into his possession until the claim of this plaintiff is adjusted and paid in accordance with its contract of insurance, referred to above; that notwithstanding such requirement of law, the defendants

have notified the plaintiff that such defendants do not recognize the contract of insurance in question in any manner whatsoever, and, further, that such defendants do not propose to carry out such contract; that unless restrained by proper order of this court the defendant Myron S. Harlan and the defendant corporation will transfer out of the State of Indiana the monies coming into the defendant Harlan's possession as agent for the defendant corporation contrary to the provisions of the Statutes of the State of Indiana; that the defendant corporation is a foreign insurance corporation without property or effects within the boundaries of the State of Indiana; that in order to collect any judgment that this plaintiff may obtain against such defendant corporation it would be necessary for the plaintiff to proceed to some foreign jurisdiction for the purpose of collecting same; that such action on the part of the defendants will work great and irreparable damage to this plaintiff; that the plaintiff is without adequate remedy at law to prevent such conduct on the part of the defendants, as described above, other than by equitable relief through a proper order from this court.

Wherefore, the plaintiff demands judgment against the defendant, Saint Paul Mercury Indemnity Company, in the amount of Four Thousand Dollars ($4,000.00) and for all other proper relief in the premises, and prays that this court will upon hearing issue a temporary injunction restraining the defendant, Myron S. Harlan, from transferring out of his possession to the defendant, Saint Paul Mercury Indemnity Company, any money that may now or hereafter be in the possession of the defendant, Myron S. Harlan, as agent of the defendant, Saint Paul Mercury Indemnity Company, pending final outcome of this cause of action.

Ryan and Ruckelshaus,
By John K. Ruckelshaus,
Attorneys for Plaintiff.

State of Indiana, }
County of Marion. } ss.

Thomas R. Kackley, being duly sworn, upon his oath says: That he is the Treasurer of Red Cab Company, and that on behalf of such corporation he states that the facts and matters set forth above are true as he verily believes.

Thomas R. Kackley.

Subscribed and sworn to before me this the 5th day of June, 1934.

Hazel R. Chitwood,
Notary Public.

My commission will expire Jan. 14, 1935.

(EXHIBIT "A").

Binder

December 30th, 1933

St. Paul Mercury Indemnity Co.....Insurance Company of St. Paul, Minn., at its Indpls. Ind. Agency agrees to bind for a period of 30 days from 12 o'clock noon of said date, insurance as follows:

Assured ..... Red Cab Company. .....
Property to be covered.....Workmen's Compensation.....
Location of property....739 East Mark St., Indianapolis, Ind.
Amount $ Open..... Rate tariff ..... Map Sheet ..... Block .....

This binder to continue in force until replaced by regular policy (but in no event for a longer period than ..... days), and shall be subject to all the terms and conditions of the regular policy of said company, but it may be cancelled by notice to the assured or his agent placing the insurance; the termination of the liability hereunder to be effective from 12 o'clock noon standard time, next subsequent to such notice.

Myron S. Harlan,
Agent.

202.

(Rough Notes Form No. 324)

And afterwards to-wit on the 5th, day of June 1934, a summons was issued on said complaint, directed to the sheriff of Marion County, which summons with return endorsed thereon, is in the words and figures following:

State of Indiana, } ss.
Marion County. }

The State of Indiana, to the Sheriff of Marion County, Greeting:

You are hereby commanded to summon, Saint Paul Mercury Indemnity Company (Serve on resident Agent, Gregory and Appell, 247 N. Penn. St.), Myron S. Harlan, 824 Circle Tower Building, to appear before the Judge of the Superior Court of Marion County, Indiana, on the 20th, day of June 1934, being the 15th, Judicial day of June Term 1934 of said court, which term commence..... at the Court House in the City of Indianapolis on the first Monday in said month and year last above named then and there to answer the complaint of Red Cab Company, and have you then and there this writ.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Superior Court, at my office in the City of Indianapolis, the 5th day of June 1934.

(Signed) Glenn B. Ralston,
(Seal) *Clerk Superior Court of Marion County.*

(On June 20, 1934, an appearance was filed, in the office of the clerk of said court, which appearance is in the words and figures following:)

State of Indiana, } ss.
County of Marion. }

SUPERIOR COURT—ROOM 3.

Red Cab Company,
vs.
St. Paul Mercury Indemnity Co., } No. A-77718.
Myron S. Harlan.

APPEARANCE.

The undersigned hereby enter their Appearance for Myron S. Harlan, in the above entitled cause.

Burke G. Slaymaker,
Slaymaker, Merrell & Locke,
Attorneys.

750 Consolidated Building.
Phone Ri. 2468.

RETURN OF SUMMONS.

Came to hand, June 5, 1934, and served the within named Saint Paul Mercury Indemnity Company, by reading this writ to, and within the hearing of W. J. Henshaw, State Manager of said Company, and delivering to him a true copy thereof, there being no Officer of said Company found within my bailiwick.

(Signed) Charles L. Sumner,
Sheriff of Marion County.
Jun 6—1934.

Per Murchie,
Deputy.

Sheriff's Fees.

Service	$ .40
Mileage	.20
Return	.20
Copy	.50
Total	1.70

And, Be It Further Remembered, that afterwards to-wit on the 20th., day of June 1934, the same being the 15th., Judicial day of the June 1934 Term of said court, before the Honorable Wm. A. Pickens, Judge thereof, the following further proceedings were had herein to-wit:

Come now the parties in the above entitled cause, by their attorneys, and the said defendant, Saint Paul Mercury Indemnity Company, files herein by its attorneys, in open court, its verified petition for the removal of this cause to the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, which petition is in the words and figures following to-wit:

State of Indiana, }
County of Marion. } ss.

IN SUPERIOR COURT OF MARION COUNTY.

Room No. 3.

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan, *Defendants.*
} Cause No. A[illegible]7718.

To the Superior Court of Marion County, Room No. 3, in and for the County of Marion, in the State of Indiana, and the Judge Thereof:

Comes now the defendant, Saint Paul Mercury Indemnity Company, by its attorneys, and not waiving or intending to waive any objection or exception to the jurisdiction of the court over the person of this defendant, your petitioner, said defendant, specially appears herein for the sole purpose of filing its petition and bond for the removal, and notice and proof of notice thereof, of this cause and for the removal of this said cause to the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, held at the City of Indianapolis in said District and said defendant, Saint Paul Mercury Indemnity Company, shows to the court that this defendant, your petitioner herein, is the sole, real, actual defendant in said cause; that the above entitled suit now pending in this court was and is brought by the plaintiff above named to recover of this defendant, your petitioner, the sum of Four Thousand Dollars ($4,000.00), on account of and pursuant to the terms of a certain written binder of insurance executed by this defendant, your petitioner, to the said plaintiff, and for a temporary injunction restraining the defendant, Myron S. Harlan, as the agent of this defendant, Saint Paul Mercury Indemnity Company, from transferring out of his possession to this defendant, your petitioner herein, any money that may now or hereafter be in the possession of said defendant, Myron S. Harlan, as the agent of this defendant, your petitioner herein, pending the final outcome of the cause of action sued on herein; that this action is wholly of a civil nature at common law and in

equity and that the matter and amount in controversy in this action exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00); that the nature of this action and of each and every controversy asserted by the plaintiff herein is particularly set forth in the complaint of the plaintiff herein; to which complaint reference is hereby made, and by this reference the said complaint is made a part of this petition as fully and to all intents and purposes as if set out at length herein, to show the nature of this action and of each and every controversy asserted by the plaintiff; that said suit really and substantially involves a dispute or controversy properly within the jurisdiction of the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, and that said cause is not alleged to arise, and as alleged, does not arise under an Act of Congress of the United States approved April 22, 1908, or any amendment thereto, or under any other statute or law preventing or limiting the right of removal of said suit.

That this defendant, Saint Paul Mercury Indemnity Company, was when this action was commenced, ever since has been and still is a corporation organized and existing under and pursuant to the laws of the State of Minnesota with its principal office and place of business in the City of Saint Paul in the State of Minnesota,and your petitioner was when this action was commenced, ever since has been and still is a citizen and resident of the State of Minnesota and a non-resident of the State of Indiana.

That the defendant, Myron S. Harlan, was when this action was commenced, ever since has been and now is a citizen and resident of the State of Indiana, and a non-resident of the State of Minnesota.

That the plaintiff, Red Cab Company, was when this action was commenced, ever since has been and still is a corporation organized and existing under and pursuant to the laws of the State of Indiana with its principal office and place of business in the City of Indianapolis, State of Indiana, and said plaintiff was when this action was commenced, ever since has been and still is a citizen and resident of the State of Indiana and a non-resident of the State of Minnesota.

Your petitioner further shows that the plaintiff states no cause of action nor any apparent or probable cause of action in favor of the plaintiff against the said defendant, Myron S. Harlan, herein; that the defendant, Myron S. Harlan, herein had not when this action was commenced, has not since had

and has not now any interest in this action or any interest in the written binder of insurance sued on by the plaintiff in this action, either as promissor or as promissee or at all and that said defendant, Myron S. Harlan, had not when this action was commenced, has not since had and has not now any interest in this action or any controversy alleged or sued on by said plaintiff herein; that said defendant, Myron S. Harlan, is merely a nominal and formal party defendant to this action and no relief is sought from said defendant, Myron S. Harlan, in his capacity as an individual but said plaintiff by its said complaint herein merely seeks an injunction against the said defendant, Myron S. Harlan, restraining him from doing certain acts as an agent for this defendant, your petitioner herein; that said defendant, Myron S. Harlan, is not a necessary, indispensable or proper party to this action and that the said Myron S. Harlan is made a party defendant to this action by the said plaintiff for the fraudulent purpose and with the fraudulent intent of the said plaintiff wrongfully and fraudulently to defeat the right of this defendant, your petitioner, to remove this cause to the United States District Court for the Southern District of Indiana, Indianapolis Division, and that the said Myron S. Harlan is, by the plaintiff, joined as a defendant in this action for such fraudulent and wrongful purpose and for no other and different purpose; that said Myron S. Harlan is not interested in this action in any manner or to any extent at all; that the said plaintiff is the sole, real party plaintiff in interest in this action and that this defendant, your petitioner, is the sole, real, actual defendant in interest in this action and that the presence of said Myron S. Harlan as a defendant to this action should be wholly and completely disregarded; that the plaintiff and this defendant, your petitioner, are parties to the alleged written binder of insurance sued on herein and that the said Myron S. Harlan is not a party to the said written binder of insurance alleged and sued on herein; that it is only in his relation as an agent for this defendant, your petitioner herein, that said defendant, Myron S. Harlan, is made a party to this action and that said plaintiff, Red Cab Company, can obtain in this action full and complete relief against this defendant, your petitioner herein, without the presence of the said Myron S. Harlan as a party to this action and that all of the relief sought to be obtained by said plaintiff in this action can be obtained by said plaintiff against this defend-

ant, your petitioner herein, without the presence of said defendant, Myron S. Harlan, as a party to this action.

Your petitioner avers that there is in this action a separable controversy between the plaintiff on the one side and this defendant, your petitioner, upon the other side and that this defendant, your petitioner, is actually interested in such controversy and is alone interested in such controversy upon the one side and that the plaintiff is alone interested in such controversy upon the other side; that the said separable controversy between the said plaintiff and this defendant, your petitioner, is whether this defendant, your petitioner, is liable to the plaintiff under and because of the written binder of insurance sued on by the plaintiff in this action and if liable, for what amount, if any at all, if this defendant, your petitioner, shall be found liable at all to the plaintiff under and because of said written binder of insurance sued on herein, and said plaintiff and this defendant, your petitioner, are alone interested in said controversy and said controversy can be fully determined between said plaintiff and your petitioner without reference to any other matter or matters alleged in the complaint herein and without the presence of said Myron S. Harlan; that this defendant, your petitioner, is not interested in any manner or way or at all in any controversy which may exist between the plaintiff and the defendant, Myron S. Harlan, and this defendant, your petitioner, is not a proper or a necessary, or indispensable party to any controversy which may exist between the plaintiff and the said defendant, Myron S. Harlan; that this suit involves a separable and distinct controversy between the plaintiff and this defendant, your petitioner, and the said Myron S. Harlan is not interested in said controversy; that a complete determination of the controversy between the plaintiff and this defendant, your petitioner, can be had without the presence of said Myron S. Harlan; that there is in fact no controversy alleged in the complaint herein between citizens and residents of the same State.

That the time within which this defendant, your petitioner, is required by the laws of the State of Indiana and the rules and practice of this court to answer or plead to the complaint herein in this action has not yet expired and your petitioner has not demurred, answered or plead to the complaint herein, and this defendant, your petitioner, now files herewith its bond in due form of law in the penal sum of One Thousand Dollars ($1,000.00), payable to said plaintiff, Red Cab Com-

pany, with good and sufficient surety for entering in the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, held at the City of Indianapolis in said District, within thirty (30) days from the date of this petition, a copy of the record in this suit and for paying all costs that may be awarded by said District Court of the United States for the Southern District of Indiana, Indianapolis Division, if it, the last mentioned court, shall hold and find that this suit was wrongfully and improperly removed thereto and for appearing in said suit.

Wherefore, this defendant, Saint Paul Mercury Indemnity Company, your petitioner, comes and prays the court to proceed no further herein except to accept this petition and said bond and to make an order requiring this defendant, your petitioner, to enter and file a copy of the record herein in said District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, held at Indianapolis in said District as provided by law.

Saint Paul Mercury Indemnity Company,
By Burke G. Slaymaker,
Slaymaker, Merrell & Locke,
Its attorneys.

State of Indiana, }
County of Marion. } ss.

Burke G. Slaymaker, of lawful age, being duly sworn according to law, upon his oath deposes and says, that he is one of the attorneys in this cause, and the attorney of record herein, for the above named defendant, Saint Paul Mercury Indemnity Company, petitioner in the above numbered and entitled cause, and as such attorney affiant is authorized and entitled to make this affidavit for and on behalf of said defendant, petitioner in the above entitled cause, and he does so make the same; that he has read the foregoing petition and knows the contents thereof, and that the same are true to his knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be correct and true, and that the reason why this verification is made by this deponent is that the said defendant is a foreign corporation and non-resident of the State of Indiana, and has no officer residing or present within said State of Indiana.

Burke G. Slaymaker.

Subscribed and sworn to this 18th day of June, A. D. 1934, before the undersigned a Notary Public in and for said County and State.

Witness my hand and notarial seal the day and date last herein appearing.

John J. Harvey (signed)
Notary Public.

(Seal)

My commission expires: Aug. 6—1936.

And at the same time the said defendant, by its attorneys, tenders and files herein, and with said petition aforesaid the bond of said defendant in the penal sum of One Thousand Dollars ($1,000.00) payable to the plaintiff with Hartford Accident and Indemnity Company, as surety, which said bond is in the words and figures following, to-wit:

State of Indiana, } ss.
County of Marion. }

IN THE SUPERIOR COURT OF MARION COUNTY.

Room No. 3

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan, *Defendants.* } Cause No. A-77718

BOND FOR REMOVAL.

Know All Men by These Presents:

That the Saint Paul Mercury Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, as principal, of the City of Saint Paul, State of Minnesota, and Hartford Accident and Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, of the City of Hartford, State of Connecticut, and duly authorized to do a surety and bonding business in the State of Indiana, as surety, are held and firmly bound unto Red Cab Company, the above named plaintiff, in the penal sum of One Thousand ($1,000.00) Dollars, for the payment whereof well

and truly to be made unto said above named plaintiff, its successors, representatives and assigns, jointly and severally, we bind ourselves, our representatives, successors and assigns, jointly and severally, firmly, by these presents:

Signed and sealed this 18th day of June, A. D. 1934.

The conditions of this obligation are such that:

Whereas: Said Saint Paul Mercury Indemnity Company, defendant in the above entitled cause, has filed in the Superior Court of Marion County, Room No. 3, in and for the County of Marion, State of Indiana, its petition for the removal of the certain above entitled cause of action therein pending, wherein the said Red Cab Company is plaintiff and the said Saint Paul Mercury Indemnity Company is defendant, and in which also one Myron S. Harlan is also named as defendant, to the District Court of the United States, in and for the Southern District of Indiana, Indianapolis Division.

Now, if the Saint Paul Mercury Indemnity Company, defendant in the above entitled cause, shall enter and file in said District Court of the United States, in and for the Southern District of Indiana, Indianapolis Division, within thirty (30) days from the date of the filing of said petition for removal, a certified copy of the record in this suit, and shall well and truly pay all costs that may be awarded in said District Court of the United States, in and for the Southern District of Indiana, Indianapolis Division, if the said District Court shall hold that such suit was wrongfully or improperly removed thereto and then and there appear and enter special bail in said suit if special bail was originally requisite therein, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

Saint Paul Mercury Indemnity Company,
Principal
By Burke G. Slaymaker,
Its Attorney.
Hartford Accident and Indemnity Company,
Surety,
By C. E. Shumaker,
Its Attorney-in-fact.

(Seal)

The within undertaking is approved as to form, amount and as to the sufficiency of the surety, this ..... day of ....., A. D. 1934.

(Signed) W. A. Perkins,
Judge.

And now at the same time the said defendant, by its attorneys files herein notice and due and sufficient proof of the service of notice to and upon the plaintiff of the intention of said defendant to file said petition and bond were duly served on said plaintiff before said petition and bond, or either thereof, were filed herein, which said notice and proof of service thereof, is in the words and figures following, to-wit:

State of Indiana, } ss.
County of Marion. }

IN THE SUPERIOR COURT OF MARION COUNTY.

Room No. 3.

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan, *Defendants.* } Cause No. A-77718.

NOTICE OF PETITION AND BOND FOR REMOVAL TO RED CAB COMPANY, PLAINTIFF IN THE ABOVE NUMBERED AND ENTITLED CAUSE AND ITS ATTORNEYS OF RECORD.

You and each of you will take notice that on the 20th day of June, A. D. 1934, in the forenoon of said day, or as soon thereafter as counsel may be heard, the above named defendant, Saint Paul Mercury Indemnity Company, will, by its attorneys, file in the above named Superior Court of Marion County, Room No. 3, in the Court Room of said Superior Court of Marion County, Room No. 3, at Indianapolis, Indiana, in the above numbered and entitled cause, the petition of said defendant, Saint Paul Mercury Indemnity Company, and the bond of said defendant, Saint Paul Mercury Indemnity Company, as required by law for the removal of said cause from the above entitled court to the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, said bond being in the sum of One Thousand ($1,000.00) Dollars, given on such removal, according to law and the requirements of the statutes in such case made and provided; and copies of said bond and

petition are hereby served, and upon the filing of said petition and bond, the said defendant, Saint Paul Mercury Indemnity Company, will present and call to the attention of said Superior Court of Marion County, Room No. 3, in and for the County of Marion in the State of Indiana, and the Judge thereof, the said petition and said bond and move the court to approve said bond and the surety thereon and to accept said petition for removal and said bond for removal and for an order for the removal of said cause from the said Superior Court of Marion County, Room No. 3, to the District Court of the United States, in and for the Southern District of Indiana, Indianapolis Division, said petition for removal being upon the grounds stated in said petition, and upon said petition and bond so filed and presented.

Burke G. Slaymaker,
Slaymaker, Merrell & Locke,
Attorneys for Defendant, Saint Paul Mercury Indemnity Company.

ACKNOWLEDGMENT OF SERVICE.

Due and sufficient service of the above notice, with copies of the papers therein mentioned, is hereby accepted on behalf of the above named plaintiff this 18th day of June, 1934.

(Signed) Ryan and Ruckleshaus,
By John K. Ruckleshaus,
Attorneys for Plaintiff, Red Cab Company.

And now the court being well advised in the premises, finds that the said defendant has filed herein within the time provided by law its petition for the removal of this cause to the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, and has at the same time filed and offered its bond herein in the sum of One Thousand Dollars ($1,000.00) with good and sufficient surety, conditioned according to law, all in due form of law, and that the notice required by law of the filing of said bond and petition was, prior to the filing of said petition, served upon the plaintiff herein, which petition, bond and notice the court finds were and are sufficient and in accordance with the requirements of the law, and this court does now and hereby accept and approve said bond and said petition, and does now order

this cause to be removed to the District Court of the United States in and for the Southern District of Indiana, Indianapolis Division, pursuant to the statutes of the United States, and the court orders that all other proceedings in this cause be stayed, and the Clerk of this Court is now ordered and directed to prepare, seal, certify and deliver unto said defendant a full, true, complete and correct transcript of all of the papers and entries in this cause.

And afterwards to-wit on the 23rd day of June, 1934, a praecipe was filed in the office of the clerk of said court, which praecipe is in the words and figures following:

State of Indiana, } ss.
County of Marion. }

IN THE SUPERIOR COURT OF MARION COUNTY.

Room No. 3.

Red Cab Company, *Plaintiff,*
vs.
Saint Paul Mercury Indemnity Company, and Myron S. Harlan, *Defendants.*
} Cause No. A-77718.

PRAECIPE.

To the Clerk of the Marion Superior Court, State of Indiana:

The defendant, Saint Paul Mercury Indemnity Company, by its attorneys, requests and directs that you forthwith prepare, seal, certify and furnish to it a full, true, complete and correct transcript of all papers, entries and proceedings in the above entitled cause for the use of said defendant in the removal of said cause.

Dated July, 1934.

Slaymaker, Merrill & Locke,
Attorneys for Defendant, Saint Paul Mercury Indemnity Company.

State of Indiana, } ss.
County of Marion. }

I, Glenn B. Ralston, Clerk of the Superior Court of Marion County, Indiana, in whose custody the files and records of said court are required by the laws of the State of Indiana to be kept hereby certify that the annexed and foregoing is a full true complete and correct copy and transcript of all of the papers, entries, and proceedings in the above entitled cause and that said transcript if taken and copied from the records of the proceedings of the said Superior Court of Marion County, Indiana, and that said foregoing copy has been compared by me with the original record of said court in said cause and that the same is a full, true and complete transcript of all papers, entries and proceedings in said cause.

In Witness Whereof, I do hereby subscribe my name officially and affix the seal of said court at the Court House in the City of Indianapolis, in said County and State this 6 day of July, 1934.

(Seal)

Glenn B. Ralston,
Clerk Superior Court of Marion County, State of Indiana.

July 6, 1934.

Received of defendants the sum of $5.00.

Clerk	2.25
Shf.	1.75
Due deft.	5.00
	$8.95

Transcript of record, on Removal to U. S. Dist. Co. So. Dist. of Ind. Indpls. Division.

Glenn B. Ralston,
Clerk.

Endorsed: Filed April 30, 1937. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighteenth day of June, 1937, the following further proceedings were had and entered of record, to-wit:

Friday, June 18, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Saint Paul Mercury Indemnity Company, *vs.* Red Cab Company.	6033	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-sixth day of June, 1937, there was filed in the office of the Clerk of this court, a Motion for Stay of Mandate, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 6033.

Saint Paul Mercury Indemnity Company, *Appellant,* *vs.* Red Cab Company, *Appellee.*	Appealed from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

The appellant, Saint Paul Mercury Indemnity Company, comes and shows to the court that it will file in the Supreme Court of the United States a petition for a writ of certiorari

in the above cause and the appellant prays the court to withhold the mandate to the district court in the above cause.

Burke G. Slaymaker,
Slaymaker, Merrell & Locke,
Attorneys for Appellant.

Endorsed: Filed June 26, 1937. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of June, 1937, the following further proceedings were had and entered of record, to-wit:

Saturday, June 26, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

6033	Saint Paul Mercury Indemnity Company *vs.* Red Cab Company.	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

Now this day comes counsel for appellant and presents a Motion to stay the Mandate of this court pending a petition to the Supreme Court of the United States for a Writ of Certiorari.

On Consideration Whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a Writ of Certiorari in the Supreme Court of the United States, and forthwith file in this court proof of the filing of said petition in said court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 41 to 76, inclusive, contain a true copy of the proceedings had and papers filed (excepting Briefs of counsel, Petition and Order extending time for Briefs and the petition for a rehearing) in the case of

Saint Paul Mercury Indemnity Company,
Appellant,

vs.

Red Cab Company,
Appellee,

No. 6033, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of July, A. D. 1937.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

FILE COPY

Office - Supreme Court, U. S
FILED
JUL 31 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936

No. 274

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

SLAYMAKER, MERRELL & LOCKE,
Indianapolis, Indiana,
Of Counsel for Petitioner.

CENTRAL PUBLISHING COMPANY, INDIANAPOLIS, INDIANA

IN THE

Supreme Court of the United States

October Term, 1936

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Saint Paul Mercury Indemnity Company comes and respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on the 18th day of June, 1937, ordering the cause remanded to the State court for lack of federal jurisdiction (R. p. 75), on which day the said Court of Appeals, without a written opinion, overruled the petition of your petitioner for a rehearing, the original opinion of said Court of Ap-

peals having been filed on the 12th day of April, 1937 (R. p. 44), which said petition for rehearing, supported by briefs, was filed by your petitioner on the 24th day of April, 1937 (R. p. 47).

STATEMENT OF THE CASE

This action was commenced by respondent against petitioner and one Myron S. Harlan in the Superior Court of Marion County, Indiana, at Indianapolis, and was by petitioner removed to the United States District Court for the Southern District of Indiana upon a petition by petitioner for removal and was duly docketed in the said District Court (R. p. 64).

The complaint filed in the State court (R. p. 75) alleged that your petitioner executed to respondent petitioner's written binder of Workmen's Compensation Insurance (R. p. 61), by which binder petitioner insured respondent against liability for workmen's compensation. The binder was not limited in amount of insurance granted. The complaint in the State court alleged (R. p. 59) that as a direct and proximate result of the petitioner's breach of said written binder of Workmen's Compensation Insurance, respondent had been required to pay, and had become obligated to pay, its employees workmen's compensation, including medical, hospital and dental bills, in connection with injuries suffered by its employees, to the damage of the respondent in the sum of Four Thousand Dollars ($4,000). The prayer of the complaint in the State court was that respondent have judgment against petitioner for $4,000 for its damages and that the co-defendant Harlan be restrained from transferring out of his possession to petitioner any moneys of the petitioner which might come into the possession of said Harlan (R. p. 60).

The petition for removal (R. p. 64) filed in the State court by your petitioner alleged that the respondent Red Cab Company was an Indiana corporation, with its principal office at the City of Indianapolis, in said State, and that said respondent was a citizen and resident of the State of Indiana; that your petitioner is a corporation organized and existing under the laws of the State of Minnesota, with its principal office at the City of St. Paul, in said State, and that it is a citizen and resident of the State of Minnesota; that the co-defendant, Myron S. Harlan, was a citizen and resident of the State of Indiana, but that no apparent or probable cause of action was alleged by the complaint against said Harlan; that said Harlan was not interested in the action, that his only relation to the matter was that he was the agent of petitioner, who as its agent executed the written binder sued on, that said Harlan was an unnecessary party to the action, was fraudulently joined to defeat the right of your petition to remove this cause to said District Court, that such suit involved a separable controversy between your petitioner and said respondent and that a complete determination of the controversy between petitioner and respondent can be had without the presence of said Harlan. In other words, the petition for removal set forth in proper form and due substance that (a) the said Harlan was fraudulently joined to defeat petitioner's right of removal, and (b) there was a separable controversy between petitioner and respondent.

The petition for removal alleged the amount in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000). (R. p. 64.)

After the cause was removed to, and docketed in, the said District Court, respondent dismissed its action as to the said Harlan. (R. p. 9.) When the judgment was

rendered, respondent was sole plaintiff and your petitioner was sole defendant in the action. (R. p. 9.)

While the case was pending in the District Court, respondent filed its second amended complaint (R. p. 3) on the same written binder (R. p. 6), in which it alleged the same contract of insurance and alleged its damages to be in the same amount of $4,000, and prayed judgment against your petitioner for $4,000 and for all other proper relief.

With respondent's amended complaint filed in the District Court, respondent filed a bill of particulars of its damages (R. p. 7), by which bill of particulars respondent set forth the amount of its loss under the binder sued on to be $1,380.89. There was no bill of particulars filed with the complaint in the State court. The facts in the case are, therefore, that when the action was commenced in the State court the plaintiff in the action sued on contract for $4,000 of unliquidated damages; but after the case had been docketed in the federal court, the plaintiff in the action filed a second amended complaint alleging its damages to be $4,000, but filed in the federal court a bill of particulars showing itemized damages of $1,380.89.

The Circuit Court of Appeals reversed the judgment (Opinion, R. p. 44) with directions to the District Court to remand the case to the State court wherein it was begun, because the Court of Appeals was of the opinion the federal court was without federal jurisdiction. The sole ground upon which the Court of Appeals rested its judgment that there was not federal jurisdiction was that there was absent the necessary jurisdictional amount in controversy. The Circuit Court of Appeals refused to decide the assignments of error properly presented to it by petitioner as appellant, on the sole ground that there

was absent such federal jurisdiction, because of an insufficient amount in controversy.

The transcript of the record before the Court of Appeals, when it gave its original opinion, did not contain the complaint filed in the State court, the petition for removal, the bond on removal and the notice of the petition and bond, that is, the transcript did not contain the transcript on removal from the State court (R. p. 1).

After the written opinion of the Court of Appeals, filed April 12, 1937, was announced, your petitioner filed with the Court of Appeals its petition for a writ of *certiorari* for diminution of the record (R. p. 49), praying to have certified by the District Court to the Court of Appeals a copy of the transcript on removal, which petition for *certiorari* was granted by the Court of Appeals (R. p. 54) and the writ of *certiorari* prayed for was issued. The Clerk of the District court made due return to the writ of *certiorari* for diminution of the record (R. p. 56) and certified to the District Court a complete copy of the transcript on removal (R. p. 57).

The trial by jury was waived by the written stipulation of the parties in the District Court (R. p. 17), the cause was tried by the court without a jury (R. p. 18), a special finding of facts and conclusions of law (R. p. 19) were made and judgment thereon was rendered in favor of respondent against petitioner for $1,162.98 (R. p. 25).

QUESTIONS PRESENTED

The questions presented by this petition for the writ of *certiorari* are:

1. Whether or not the fact of jurisdiction on removal is determined by the state of the facts shown by the com-

plaint of the plaintiff in the State court at the time of the removal, or by an amendment of the complaint in the Federal court after removal.

2. Whether the Circuit Court of Appeals has decided a federal question of substance, namely, a question of federal jurisdiction, not in accord with, but diametrically opposed to, the following applicable decisions of the Supreme Court, namely:

Kirby v. American Soda Fountain Co., 194 U. S. 141;
Cooke v. United States, 2 Wall. 218.

Clearly the decision of the Circuit Court of Appeals is not in accord with the said applicable decisions of the Supreme Court.

3. Whether the Circuit Court of Appeals can lawfully refuse to decide the assignments of error properly presented to it, upon the ground that there is no federal jurisdiction, where the amount in controversy is sufficient under the allegations of the complaint in the State court, and where, therefore, federal jurisdiction is shown by the record to exist.

4. Whether the Circuit Court of Appeals may lawfully refuse to decide assignments of error properly presented to it, on the ground that there was no federal jurisdiction because the amended complaint filed in the federal court, after the removal of the cause, showed, by a bill of particulars therewith filed, the amount of damage to be less than three thousand dollars ($3,000), where, by the complaint filed and on file in the State court at the time of the removal, the amount in controversy was more than three thousand dollars, exclusive of interest and costs.

REASONS FOR GRANTING THE PETITION

1. The Circuit Court of Appeals decided that federal jurisdiction was shown by the record not to exist, ordered the cause remanded to the State court, and refused to consider any of petitioner's errors set forth in petitioner's assignment of errors.

The action as commenced in the State court was for the recovery against petitioner of four thousand dollars of unliquidated damages for breach of a written contract of workmen's compensation insurance, in an unlimited amount, executed and delivered by petitioner to respondent. The petition for removal alleged the amount in controversy to exceed $3,000 exclusive of interest and costs. The amount in controversy, as alleged in the petition for removal, was never denied by respondent. The respondent's damage was positively alleged in the complaint to be four thousand dollars. No bill of particulars of such damage was filed in the State court. The petition for removal alleged and showed, and respondent never, in either the State court or in the federal District Court, denied that there was (a) a separable controversy between respondent and petitioner or (b) that the resident defendant was fraudulently joined. In the federal court there was a voluntary dismissal as to the resident defendant.

There was clearly federal jurisdiction shown by the record in the State court at the time of removal, because the complaint filed and on file in the State court, at the time of removal, and the petition for removal, showed the amount in controversy to be four thousand dollars.

The existing federal jurisdiction at the time of removal was not lost or destroyed by the fact that, after the re-

moval, in the federal District Court, the respondent filed an amended complaint with a bill of particulars of his damage showing respondent's damage and loss to be less than $3,000.

Federal jurisdiction of a cause removed from a State court, insofar as the amount in controversy is concerned, is determined by the state of the record in the State court at the time of the removal.

Amending the complaint in the federal court after removal, by reducing the amount of damage alleged, and of the recovery sought, below the jurisdictional amount does not defeat the federal jurisdiction theretofore actually acquired. The District Courts throughout the Seventh Circuit, in virtue of the present decision of the Court of Appeals, if it shall become final, are now compelled to remand every removal cause when, after the removal, the complaint shall have been amended to reduce the damages sued for to $3,000 or less. Thus is destroyed the right of defendants to the exercise of federal jurisdiction. Thus are destroyed all rights of defendants whose cases are thus erroneously remanded, even to present the question of jurisdiction to the Court of Appeals on appeal, and to come to this court on petition for certiorari for the correction of so fundamental an error. The situation as to jurisdiction in removal causes in the Seventh Circuit is, therefore, such as to require the intervention of the Supreme Court, if the error of the Circuit Court of Appeals ever shall be corrected, and warrants the granting of the writ now prayed for in the instant cause.

2. The Supreme Court, in the cases of *Kirby v. American Soda Fountain Co.*, 194 U. S. 141 and *Cooke v. United States*, 2 Wall. 218, decided that when the jurisdiction of

the federal court has once attached, a subsequent change in the amount in controversy does not divest the federal court of jurisdiction. Such decisions of the Supreme Court are applicable here. The decision of the Circuit Court of Appeals in the case at bar is not in accord therewith, but directly opposed thereto.

3. The Circuit Court of Appeals could not lawfully refuse to consider and decide petitioner's errors assigned in the Circuit Court of Appeals, because the record showed that the Circuit Court of Appeals and the District Court had jurisdiction of the cause. The errors assigned by petitioner, none of which the Circuit Court of Appeals considered and decided, were that the facts found by the special findings of facts did not support the judgment and the law was with the petitioner, that the District Court erred in each of its conclusions of law on its special findings of facts, and erred in refusing to make petitioner's requested declarations of law on the special findings. (R. p. 31.)

The refusal of the Circuit Court of Appeals to decide the petitioner's assignments of error presented to it deprived the petitioner of its day in court.

4. If the Circuit Court of Appeals had proceeded to decide petitioner's assignments of error, unimpeded by the erroneous view that because of the absence of the amount in controversy necessary to federal jurisdiction there was lacking federal jurisdiction, it would have been compelled to accept petitioner's contentions (a) that the facts found by the District Court in its special finding of facts showed that the law was with the petitioner and (b) that the Circuit Court of Appeals should direct the District Court to re-state its conclusions of law on the special findings of facts and to render judgment for petitioner. Instead

the District Court was directed to remand the cause to the State court.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1936.

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,
vs.
RED CAB COMPANY,
Respondent.

No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURTS BELOW

No opinion was filed by the District Court.

The original opinion of the Circuit Court of Appeals was filed on the 12th day of April, 1937, and is reported in 90 Fed. (2d) 229. No opinion was filed by the Circuit Court of Appeals upon the overruling of petitioner's petition for a rehearing, which petition for rehearing was denied June 18, 1937.

JURISDICTION

The jurisdiction of this court is based upon the Judicial Code Sec. 240 as amended (28 USCA, Sec. 347).

The date of the judgment of the District Court is June 19, 1936.

The date when the judgment of the Circuit Court of Appeals became final is June 18, 1937.

The petition for *certiorari* was filed July 31, 1937.

THE FACTS

The transcript filed originally in the Circuit Court of Appeals did not include the transcript on removal, as this was not deemed necessary by counsel for either of the parties, because (a) an amended complaint was filed in the federal court after the removal and (b) because it was believed that the amended complaint itself showed the necessary jurisdictional facts, including the amount in controversy, since the amended complaint alleged the unliquidated damages of the respondent to be $4,000, and prayed judgment for that sum, though there was filed afterward, for the first time, in the federal court, a bill of particulars showing the damage sustained by respondent to be less than $3,000.

But the Circuit Court of Appeals, after its original opinion was filed, had brought before it, as a part of the record, the transcript on the removal of the cause, by the return of the Clerk of the District court to the writ of *certiorari* for diminution of the record issued out of the Circuit Court of Appeals, which transcript showed federal jurisdiction to exist at the time of the removal.

The complaint filed in the State court and on file at the time of the removal alleged, on the subject of the amount in controversy, as follows (R. p. 59):

> "That as a direct and proximate result of the defendant corporation's breach of contract the plaintiff was compelled to employ attorneys, investigators and medical assistance for the purpose of investigating and satisfying claims made by its employees

during the thirty day period from December thirtieth (30) 1933, covered by the defendant corporation's contract of insurance; that furthermore the plaintiff was required to pay to its employees who had suffered injury during the period covered by the defendant corporation's contract of insurance, as described above, compensation for such claims, as was required by law, and the plaintiff was furthermore required to pay, or obligate itself to pay, certain medical, hospital and dental bills in connection with the injuries suffered by such employees, all to its damage in the sum of Four Thousand Dollars ($4,000)."

The prayer of the complaint (R. p. 60) filed and on file in the State court when the petition for removal was filed was as follows:

"Wherefore the plaintiff demands judgment against the defendant, Saint Paul Mercury Indemnity Company, in the amount of Four Thousand Dollars ($4,000.00) and for all other proper relief in the premises, and prays that this court will upon hearing issue a temporary injunction refraining the defendant, Myron S. Harlan, from transferring out of his possession to the defendant, Saint Paul Mercury Indemnity Company, any money that may now or hereafter be in the possession of the defendant, Myron S. Harlan, as agent of the defendant, Saint Paul Mercury Indemnity Company, pending final outcome of this cause of action."

The writ of *certiorari* for diminution of the record on appeal was sought and obtained by petitioner at the time it filed its petition in the Circuit Court of Appeals for a rehearing on the jurisdictional question and in aid of the petition for rehearing. (R. p. 47.)

The petition for *certiorari* for diminution of the record (R. p. 49) stated that the transcript on removal showed

that it would appear to the Circuit Court of Appeals, by the transcript on removal, that there clearly was federal jurisdiction, and that the *certiorari* was sought in aid of the petition for rehearing and to show to the Circuit Court of Appeals that there was jurisdiction of this cause.

After having considered the transcript on removal as a part of the record, the Circuit Court of Appeals denied a rehearing (R. p. 75) and adhered to its original view that there was not in controversy the amount necessary to federal jurisdiction, and thus made final, on June 18, 1937, its judgment that the cause be remanded to the State court.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that federal jurisdiction was not to be determined by the state of the record as to the amount in controversy as shown by the record in the State court at the time of removal, but instead was to be determined by the amendment of the complaint after removal to the federal District Court.

2. The federal question of federal jurisdiction here involved was decided by the Circuit Court of Appeals in a way not in accord with the decisions of the Supreme Court, applicable here, namely, *Kirby v. American Soda Fountain Co.*, 194 U. S. 141 and *Cooke v. United States*, 2 Wall. 218.

3. The Circuit Court of Appeals erred in refusing to decide the questions raised by petitioner's assignment of errors concerning the District Court's conclusions of law on the special findings of facts, the insufficiency of

the facts specially found to sustain the judgment and the right of the petitioner to have judgment ordered to be rendered for petitioner on the special findings of facts and the re-stated conclusions of law sought by petitioner thereon.

4. The Circuit Court of Appeals erred in failing to hold that the facts found by the District Court's special findings of facts were insufficient to sustain the judgment in favor of respondent.

5. The Circuit Court of Appeals erred in overruling petitioner's petition for a rehearing.

ARGUMENT

COMPLETE JURISDICTION IS SHOWN BY THE RECORD

If, as here, the complaint on file in the State court at the time of removal to the federal court is sufficient to confer federal jurisdiction, the subsequent amendment of the complaint by the plaintiff in the federal court, after the case is docketed in the federal court, by reducing the amount of his damage, does not deprive the federal court of jurisdiction; that is to say, federal jurisdiction depends upon the state of the record at the time the petition for removal is filed.

The decision of the Circuit Court of Appeals is not in accord with the applicable decisions of the Supreme Court.

In *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 24 S.Ct. 619, at page 621, the Supreme Court, in an opinion by Mr. Chief Justice Fuller, said that—

> "it is the general rule that when the jurisdiction of a Circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions."

In the Kirby case the Supreme Court reviewed previous cases decided by it, approved them, and in stating the effect of the holdings of the court in prior cases said, at page 621,—

> "In *Cooke v. United States,* Mr. Chief Justice Chase said that 'jurisdiction once acquired cannot be taken away by any change in the value of the subject of controversy.' "

Further, in its opinion in the Kirby case, at page 621, the Supreme Court referred to a District court case announcing the same principle and said:

> "In *Roberts v. Nelson*, the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it."

The Kirby case (194 U. S. 141) was one in which the complaint in the State court, at the time of the removal, averred the amount in controversy to be within the jurisdiction of the federal court, as is true in the case at bar. The case was properly removed. While the case was pending in the federal court the defendant filed a cross-complaint against the plaintiff and sought to recover from the plaintiff an amount less than the amount essential to federal jurisdiction. Thereupon the plaintiff dismissed his complaint, so that there remained pending before the court, as the sole pleading seeking affirmative relief, the cross-complaint of the defendant for an amount less than the amount essential to federal jurisdiction. The Supreme Court held, however, that there was federal jurisdiction and sustained a judgment on the cross-complaint in an amount less than the amount essential to federal jurisdiction.

In *Cooke v. United States*, 2 Wall. 218, 219, 17 L. Ed. 755, the plaintiff offered a remission of so much of his claim as would make the claim remaining less than the amount necessary to confer federal jurisdiction. The offer of remission was made upon condition of payment of the remainder. The plaintiff's offer was not accepted by the defendant. The Supreme Court, in an opinion by Mr. Chief Justice Chase, holding in favor of federal jurisdiction, said,—

> "It does not appear that the proposition has been accepted; and if not, the amount in controversy remains unaffected. But had the alleged reduction

> been made by an actual payment, the jurisdiction of the court would not be affected. The jurisdictional facts existed at the time of issuing and serving the writ of error. By its issuance and service the court obtained jurisdiction over the cause, and this jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."

Applying the foregoing applicable decisions of the Supreme Court to the facts in the case at bar, it will be seen that clearly the decision of the Circuit Court of Appeals is erroneous and not in accord with the decisions of the Supreme Court.

In *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, at page 9, the Sixth Circuit, in an opinion by Circuit Judge Lurton, said:

> "Whatever the facts of the plaintiff's claim, and however he may have stated his demand before commencing suit, he voluntarily chose to begin a suit upon a claim which, in amount, was within the jurisdiction of the Circuit court, and therefore removable. Whether the facts would or would not support his claim as stated, or for the amount he demanded, is a matter of no moment. *Jurisdiction to hear and determine that claim existed in the Circuit Court to which the cause was removed, and the jurisdiction thus acquired could not be defeated by any subsequent amendment of his pleadings, bill of particulars, or other form of concession as to any part of his demand.*"

In *Twin Hills Gasoline Co. v. Bradford Oil Corp.*, 264 Fed. 440 (D. C.), the court quoted from the case of *Johnson v. Computing Scale Co.*, (D. C.) 139 Fed. 339, and approved the following:

> "Where the amount claimed by a plaintiff in his complaint in a state court, and which he is entitled to recover if its allegations are true, is sufficient to give a federal court jurisdiction, and the cause is otherwise removable, he cannot defeat such jurisdiction after removal by changing his position or the record with respect to the amount claimed."

After quoting the foregoing from the Johnson case, the court in the Twin Hills Gasoline Company case then said:

> "The claim as made and standing on the record of the case at the time the removal is effected is what determines the jurisdiction of the United States Court. * * *
>
> "The motion to remand, after the case had been removed to this court and the plaintiff had filed an amendment reducing the amount sued for below $2,000.00, exclusive of interest and costs, was submitted to District Judge Youmans, assigned to this District, and the same was by him overruled. The motion to remand is now renewed by the plaintiff, and the same is overruled."

In *Travelers' Protective Assn. v. Smith*, 71 Fed. (2d) 511 (4th C. C. A.), the plaintiffs commenced their suit in the State court, and in their complaint in the State court they sought to recover $5,000. After the case had been removed to the federal court, and after the defendant had answered the complaint, the plaintiffs filed in the federal court a written waiver of their right to recover on the cause of action alleged any amount in excess of $3,000 and remitted to the defendant any excess which they might be entitled to recover in excess of that amount. The plaintiffs then moved that the cause be remanded to the State court on the ground that such remittitur had been filed. The Circuit Court of Appeals

for the Fourth Circuit held that the jurisdiction of the federal court was not defeated, or the removal rendered improper, by the remittitur subsequently filed. The Court of Appeals, at page 512, said:

> "As the action involved more than $3,000.00 and was wholly between citizens of different states, it was properly removed into the federal court and the jurisdiction of that court attached. And it is perfectly clear that the jurisdiction was not defeated or the removal rendered improper by the remittitur subsequently filed."

The decision of the Circuit Court of Appeals in the case at bar fixes for all the District Courts in the entire Seventh Circuit the rule that, notwithstanding a case removed is a removable one at the time of the removal, involving an amount in controversy beyond $3,000, if after removal the plaintiff chooses to amend his complaint in the federal court by reducing his allegation of damages to, or below, $3,000, the District Court must thereupon remand the case to the State court. The defendant whose case is so remanded will thus have lost forever his right to have his cause determined by the federal court. Such a defendant is thus cast without a remedy. He can not appeal to the Circuit Court of Appeals to correct the error. He can not come to this court for a writ of certiorari to correct the error against him and to secure his rights under the Acts of Congress and the federal Constitution giving him the right to have his case decided by the national courts. Every such defendant in the Seventh Circuit is now remediless. This should not be. Only this court, and in the case at bar, can correct such an error and avoid such an injustice. The District Courts must follow the Circuit Court of Appeals and that court has refused to acknowledge and correct its error.

Cases are numerous and frequent where a cause removable as alleged in the State court is removed, in which, after the statute of limitations has run to bar a fresh action, the federal District Court has sustained a demurrer to the plaintiff's complaint or reply or overruled plaintiff's demurrer to an affirmative answer, to the displeasure of the plaintiff's counsel. The plaintiff has found that the federal court has determined that the law is against the plaintiff. Now, under the existing decision of the Circuit Court of Appeals in the case at bar, all that the plaintiff in such case need do, to abandon a jurisdiction he has found unfavorable, and try his luck in another court, is to amend his complaint by reducing his allegation and demand of damages to $3,000, whereupon the federal District Court will be required to send the case to the State court. The right of a defendant to enjoy the exercise of federal jurisdiction in a removable case properly removed is a substantial right. The courts should not, and do not, favor experimenting by a party to litigation, first in one court, then in another, until perchance he may find one that shall agree with him. A defendant properly in the federal court with his case and entitled to remain there for final decision on the merits should not be thrust out of the federal court by the experiment of the plaintiff's amending his complaint by reducing his demand because merely the plaintiff in the given case has become informed that the federal court considers he has no right to recovery.

In the case at bar, the petitioner is entitled to have its case—the case made by the record in this case—decided by the federal court. The Court of Appeals has denied petitioner that right. It has refused to pass on simple questions of merits presented by the errors assigned in the Circuit Court of Appeals. It has relegated petitioner to the State court. Petitioner beseeches this Court to pre-

serve to petitioner the right to have its case on the merits decided by the federal courts, as is its due.

The Circuit Court of Appeals, in deciding there is no jurisdiction in the case at bar, relied on two cases, inapplicable here, decided by this Court, namely:

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780;

K V O S v. Associated Press, 299 U. S. 269, 57 S. Ct. 197.

We submit that neither of the cases cited and relied on by the Court of Appeals is in point here because:

1. The case at bar, as alleged by the complaint in the State court, was one for the recovery of unliquidated money damages laid by the complaint in the sum of $4,000, commenced in the State court and removed to the federal court.

2. The case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 56 S. Ct. 780, was solely for equitable relief by injunction to restrain the enforcement of a State statute, and not for the recovery of money damages. It was commenced originally in the federal court, not in the State court, and was not a removal case. As to amount in controversy, jurisdiction was rested solely on—

> "* * * the value of the object or right to be protected against interference."

Said this court, in its opinion:

> "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular

> allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000.00. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

The McNutt case is thus seen instantly to be wholly irrelevant to the case at bar.

3. In the case of *KVOS v. Associated Press*, 299 U. S. 269, 57 S. Ct. 197, also the plaintiff invoked the original jurisdiction of the federal court, in equity, for injunctive relief. The case was not commenced in the State court, and was not removed to the federal court. This Court stated, in summary, the allegations of the bill as follows:

> "Respondent is a New York corporation and petitioner a Washington corporation; 'the damage to which complainant is being subjected * * * is in excess of the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.'"

The plaintiff in the KVOS suit sought to enjoin the defendant, in the operation of defendant's radio station, from pirating news from members of the plaintiff Associated Press. Upon a hearing for a temporary injunction, the District Court dismissed the bill for want of federal jurisdiction.

The defendant, in the KVOS case, challenged the plaintiff's allegations of the amount alleged to be in controversy, this court saying that,—

> "The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. * * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof."

This court held that the plaintiff in the KVOS case had wholly failed to meet that burden.

Speaking further of the bill in the KVOS case, this Court said:

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion. In this case the formal allegation is not re-enforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations. In effect it stands alone. Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; though it might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over which it had juris-

diction. But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof."

4. In the case at bar there was no challenge by either party of the jurisdictional allegations of either the complaint in the State court or the petition for removal, both of which alleged the amount in controversy to be $4,000, and nothing in the original complaint in the State court or in the petition for removal contradicted, or tended to contradict, the allegation that the amount in controversy was $4,000, exclusive of interest and costs. In no manner did either party in the case at bar present any issue of jurisdiction because of amount in controversy or for any other reason.

Very clearly there is jurisdiction in the case at bar, and the cause should not be remanded to the State court.

CIRCUIT COURT OF APPEALS SHOULD DECIDE PETITIONER'S ASSIGNMENT OF ERRORS

When the Circuit Court of Appeals, finding first that federal jurisdiction was not shown by the record then before it when it gave its original opinion, afterwards had brought before it, on the return to its writ of *certiorari*, the transcript on removal containing the complaint filed in the State court, and the petition for removal, which showed the amount in controversy to be $4,000, and that federal jurisdiction was therefore present, the Circuit Court of Appeals should have decided petitioner's assignment of errors on the merits. When it refused to do so, it placed its refusal on an untenable ground.

The Circuit Court of Appeals furthermore should have given the reasons on which it rested its final judgment

that there was absence of federal jurisdiction, after it had brought before it, on *certiorari*, the transcript on removal.

A somewhat similar situation arose in *Lutcher & Moore, Lumber Co. v. Knight*, 217 U. S. 257. In that case the Circuit Court of Appeals failed to consider the case before it, placing its refusal on an untenable premise (not important here). This court remanding the case to the Circuit Court of Appeals (p. 268) "to the end that the duty to hear and decide it may be performed," said (p. 67) that—

> "* * * we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

The same has occurred in this case. The Circuit Court of Appeals, in refusing to decide petitioner's assignments of error, has misconstrued the record as to the amount in controversy, and has deprived the petitioner of its right, under the Acts of Congress, to have its cause decided by the federal courts.

In *Buzynski v. Luckenbach Steamship Co., Inc.*, 277 U. S. 226, at page 228, this Court said:

> "Where the Circuit Court of Appeals erroneously reverses a judgment upon one question without deciding another upon which its correctness also depends, the case may be reversed for the error and remanded to that court for decision of the other question."

In *Baltimore, etc., R. Co., v. United States*, 279 U. S. 781, 787, this Court said:

> "The lower court entered its decree dismissing the suit and, after reversal here, denied restitution

without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given the reasons on which they rested their decisions. * * *"

It is the contention of petitioner that if the Circuit Court of Appeals had considered petitioner's assignment of errors it would have been compelled to hold that the facts found by the special findings of facts by the District Court are not sufficient to sustain the judgment against petitioner, and that petitioner is entitled to have the judgment appealed from reversed, the District Court's conclusions of law re-stated in favor of petitioner, and judgment thereon rendered in favor of petitioner.

Petitioner submits that the case should be remanded to the Circuit Court of Appeals for a decision of petitioner's assignments of errors; or that the cause be decided by this court on its merits upon further consideration. It is, however, not thought proper by us now to burden this court with a demonstration of the correctness of petitioner's contentions respecting the merits, believing that this court will prefer to reverse the judgment of the Circuit Court of Appeals and to remand the case to the Circuit Court of Appeals for the decision, by that court, of petitioner's assignments of errors on the merits.

WHEREFORE petitioner prays that the writ be granted.

BURKE G. SLAYMAKER,
Indianapolis, Indiana,
Attorney for Petitioner.

SLAYMAKER, MERRELL & LOCKE,
Indianapolis, Indiana,
Of Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1937.

No. 274.

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

BRIEF FOR PETITIONER

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CENTRAL PUBLISHING COMPANY, INDIANAPOLIS, INDIANA

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THE OPINIONS OF THE COURTS BELOW

No opinion was filed by the District Court.

The original opinion of the Circuit Court of Appeals was filed on the 12th day of April, 1937, and is reported in 90 Fed. (2d) 229. No opinion was filed by the Circuit Court of Appeals upon the overruling of petitioner's petion for a rehearing, which petition for rehearing was denied June 18, 1937.

JURISDICTION

The jurisdiction of this court is based upon the Judicial Code, Sec. 240 as amended (28 USCA, Sec. 347).

The date of the judgment of the District Court is June 19, 1936.

STATEMENT OF THE CASE

This action was commenced by respondent against petitioner and one Myron S. Harlan in the Superior Court

of Marion County, Indiana, at Indianapolis, and was by petitioner removed to the United States District Court for the Southern District of Indiana upon a petition by petitioner and was duly docketed in the said District Court. (R, p. 64.)

The complaint filed in the State court (R. p. 75) alleged that your petitioner executed to respondent petitioner's written binder of Workmen's Compensation Insurance (R. p. 61), by which binder petitioner insured respondent against liability for workmen's compensation. The binder was not limited in amount of insurance granted. The complaint in the State court alleged (R. p. 59) that as a direct and proximate result of the petitioner's breach of said written binder of Workmen's Compensation Insurance, respondent had been required to pay, and had become obligated to pay, its employees workmen's compensation, including medical, hospital and dental bills, in connection with injuries suffered by its employees, to the damage of the respondent in the sum of Four Thousand Dollars ($4,000). The prayer of the complaint in the State court was that respondent have judgment against petitioner for $4,000 for its damages and that the co-defendant Harlan be restrained from transferring out of his possession to petitioner any moneys of the petitioner which might come into the possession of said Harlan. (R. p. 60.)

The petition for removal (R. p. 64) filed in the State court by petitioner alleged that the respondent Red Cab Company was an Indiana corporation, with its principal office at the City of Indianapolis, in said State, and that said respondent was a citizen and resident of the State of Indiana; that petitioner is a corporation organized and existing under the laws of the State of Minnesota, with its principal office at the City of St. Paul, in said State,

and that it is a citizen and resident of the State of Minnesota; that the co-defendant, Myron S. Harlan, was a citizen and resident of the State of Indiana, but that no apparent or probable cause of action was alleged by the complaint against said Harlan; that said Harlan was not interested in the action, that his only relation to the matter was that he was the agent of petitioner, who as its agent executed the written binder sued on; that said Harlan was an unnecessary party to the action, was fraudently joined to defeat the right of petitioner to remove this cause to said District Court, that such suit involved a separable controversy between petitioner and said respondent and that a complete determination of the controversy between petitioner and respondent can be had without the presence of said Harlan. In other words, the petition for removal set forth in proper form and due substance that (a) the said Harlan was fraudently joined to defeat petitioner's right of removal, and (b) there was a separable controversy between petitioner and respondent.

The petition for removal alleged the amount in controversy exceeded, exclusive of interest and costs, the sum of Three Thousand Dollars. (R. p. 64.)

After the cause was removed to, and docketed in, the said District Court, respondent dismissed its action as to the said Harlan. (R. p. 9.) When the judgment was rendered, respondent was sole plaintiff and petitioner was sole defendant in the action. (R. p. 9.)

While the case was pending in the District Court, respondent filed its second amended complaint (R. p. 3) on the same written binder (R. p. 6), in which it alleged the same contract of insurance and alleged its damages to be in the same amount of $4,000, and prayed judgment against petitioner for $4,000 and for all other proper relief.

With respondent's amended complaint filed in the District Court, respondent filed a bill of particulars of its damages (R. p. 7), by which bill of particulars respondent set forth the amount of its loss under the binder sued on to be $1,380.89. There was no bill of particulars filed with the complaint in the State court. The facts in the case are, therefore, that when the action was commenced in the State court the plaintiff in the action sued on contract for $4,000 of unliquidated damages; but after the case had been docketed in the federal court, the plaintiff in the action filed a second amended complaint alleging its damages to be $4,000, but filed in the federal court a bill of particulars showing itemized damages of $1,380.89.

The Circuit Court of Appeals reversed the judgment (Opinion, R. p. 44) with directions to the District Court to remand the case to the State court wherein it was begun, because the Court of Appeals was of the opinion the federal court was without federal jurisdiction. The sole ground upon which the Court of Appeals rested its judgment that there was not federal jurisdiction was that there was absent the necessary jurisdictional *amount in controversy*. The Circuit Court of Appeals refused to decide the assignments of error properly presented to it by petitioner as appellant, on the sole ground that there was absent such federal jurisdiction, because of an insufficient amount in controversy.

The transcript of the record before the Court of Appeals, when it gave its original opinion, did not contain the complaint filed in the State court, the petition for removal, the bond on removal and the notice of the petition and bond; that is, the transcript did not contain the transcript on removal from the State court. (R. p. 1.)

After the written opinion of the Court of Appeals, filed April 12, 1937, was announced, petitioner filed with the Court of Appeals its petition for a writ of *certiorari* for diminution of the record (R. p. 49), praying to have certified by the District Court to the Court of Appeals a copy of the transcript on removal, which petition for *certiorari* was granted by the Court of Appeals (R. p. 54) and the writ of *certiorari* prayed for was issued. The Clerk of the District court made due return to the writ of *certiorari* for diminution of the record (R. p. 56) and certified to the District Court a complete copy of the transcript on removal. (R. p. 57.)

The trial by jury was waived by the written stipulation of the parties in the District Court (R. p. 17), the cause was tried by the court without a jury (R. p. 18), a special finding of facts and conclusions of law (R. p. 19) were made and judgment thereon was rendered in favor of respondent against petitioner for $1,162.98. (R. p. 25.)

Exhibit "B" attached to the second amended complaint was the statement of the names of the employees, the date of the injuries, the nature of the injuries and the amount paid or incurred by respondent. (Tr. pp. 7-8.)

Petitioner demurred to the second amended complaint for want of facts. (Tr. p. 8.)

The demurrer was overruled, to which ruling of the District Court petitioner at the time excepted. (Tr. p. 10.)

The petitioner answered in two paragraphs. (Tr. p. 11.)

The first paragraph of the answer was a general denial, the petitioner denying each and every allegation contained in the second amended complaint. (Tr. p. 11.)

The second paragraph of the answer set up that the binder provided that it may be cancelled by the petitioner by notice to the assured, or his agent placing the insurance; that pursuant to such provision of the binder, notice in writing was given by the petitioner of the termination of the liability under the binder by letter, in writing, addressed to and received by the agent of the respondent who, for the respondent, placed the insurance; that such termination of the liability of the petitioner under the binder was effected before the occurrence of the injuries or any of the injuries alleged and relied on in the second amended complaint. (Tr. pp. 11-16.)

The reply of the respondent was a general denial by which every material allegation of the second paragraph of the answer was denied. (Tr. p. 16.)

Both parties requested the District Court to make, sign and file special findings of facts and conclusions of law, which the court consented to do, and on June 19, 1936, did. (Tr. p. 17.)

SPECIAL FINDINGS OF FACTS

The special findings of facts are as follows: (Tr. pp. 19-25.)

1. That respondent is an Indiana corporation, with its principal office at Indianapolis, Indiana, and is a citizen and resident of the State of Indiana and engaged in the taxicab business for more than five years prior to December, 1935, in which business it employed a number of drivers in December, 1933, and January, 1934.

2. That the petitioner is a corporation organized under the laws of the State of Minnesota and is a citizen and resident of that State, with its principal office in St.

Paul, in said State, and is duly admitted to do a casualty and Workmen's Compensation business in Indiana, and was so authorized and engaged in 1933 and 1934.

3. That some time prior to December 1, 1933, respondent elected to operate under the provisions of the Indiana Workmen's Compensation Act, and during the months of December, 1933, and January, 1934, was so operating.

4. That a short time prior to December 30, 1933, the respondent requested one Clifford E. Waggoner, who was an insurance broker with offices in the City of Indianapolis, Indiana, to procure for the respondent an insurance policy covering respondent's Workmen's Compensation losses; that said Clifford E. Waggoner, pursuant to such request, on December 30, 1933, did procure from the petitioner's duly authorized agent, one Myron S. Harlan, whose office was likewise in the City of Indianapolis, Indiana, a written binder in the words and figures following:

"Binder

"December 30, 1933.

"St. Paul Mercury Indemnity Co..... Insurance Company of St. Paul, Minn., at its Indianapolis (Ind.) Agency agrees to bind for a period of 30 days from 12 o'clock noon of said date, insurance as follows:

Assured—Red Cab Company.

Property to be covered—Workmen's Compensation.

Location of Property—739 East Market St., Indianapolis, Ind.

Amount $..... Open..... Rate tariff.....
Map Sheet..... Block.....

This binder to continue in force until replaced by regular policy (but in no event for a longer period than ..... days), and shall be subject to all term and conditions of the regular policy of said company, but it may be cancelled by notice to the assured or his agent placing the insurance; the termination of the liability hereunder to be effective from 12 o'clock noon standard time, next subsequent to such notice.

MYRON S. HARLAN, Agent."

5. That said written binder contract of insurance referred to above was delivered by said Myron S. Harlan on behalf of the petitioner to said Clifford E. Waggoner, on December 30, 1933, who in turn delivered said binder to the respondent; that said binder was the only contract delivered by the petitioner to the respondent, and no regular policy or any policy of said petition was ever executed or delivered by the petitioner or any agent of it to the respondent or said Clifford E. Waggoner, or anyone else.

6. That it was the established custom and usage of the insurance trade and business in the State of Indiana at the time referred to herein to issue a binder contract of insurance and later, in the event that the insurer elected, to issue a regular policy of insurance which would supersede such binder contract.

7. That respondent mailed to the petitioner its check in the amount of $215.61, intended by respondent as the premium owing from respondent to petitioner in connection with such binder contract of Workmen's Compensation Insurance, which such check the petitioner returned to the respondent during the month of February, 1934, with

the petitioner's letter to the respondent dated February 16, 1934.

8. That between the 6th day of January, 1934, and the 28th day of January, 1934, ten of the employees engaged in the business of driving the respondent's taxicabs suffered injury during the course of their employment and made claim against the respondent by reason of such injuries. The injuries, including a list of the expenses incurred by the respondent in connection with such compensation claims, were then listed showing that the injuries to the ten several employees occurred on the 6th, 8th, 9th, 13th, 18th, 23rd, 24th and 28th of January, 1934. The claim of the respondent set forth an allowance of $350 for attorney's fees, $25 for investigation expense, $147.70 for interest and $855.89 for compensation in employees, totaling $1,378.59.

9. That the respondent notified the petitioner of each of the accidents referred to above. The petitioner, by its attorney, made certain investigations in connection with such claims for compensation. Thereafter, during the month of February, 1934, the petitioner, through its attorney, notified the respondent that the petitioner denied liability in connection with such claims and that its action in investigating the same should not be construed as a waiver of any defense that the petitioner might have in connection with such binder.

10. That the amounts referred to above for employees' compensation and expenses incurred in connection therewith by the respondent were fair and reasonable charges under the circumstances. That such amounts specified above have been paid out by the respondent or such indebtedness has been incurred by the respondent in

connection with the claims of employees injured in the course of their employment during the period extending from January 6, 1934, to January 28, 1934.

11. That the petitioner has denied liability for all of such claims and has refused to pay to the respondent any of the amounts referred to herein; that no amount of money whatsoever has been paid by the petitioner to the respondent or any of its employees referred to herein in connection with the claims of employees or expenses of the respondent listed above.

12. That said Myron S. Harlan, above herein referred to, was at all times mentioned herein the duly commissioned and licensed agent of the petitioner at Indianapolis, Indiana, and authorized for petitioner to effect contracts of Workmen's Compensation Insurance on its behalf and to give notice and effect the cancellation of same on petitioner's behalf.

13. That the binder sued on herein by the respondent was procured for the respondent by said Clifford E. Waggoner, and said Clifford E. Waggoner alone acted for the respondent in the procuring and receiving from the petitioner of the said binder contract of insurance sued on in this action.

14. That the said Clifford E. Waggoner was authorized and empowered by the respondent and for and on behalf of the respondent to procure, receive and accept from the petitioner said written binder contract of insurance.

15. On January 3, 1934, said Myron S. Harlan, as agent of and for the petitioner, wrote, addressed and

mailed to the said Clifford E. Waggoner a letter in the words and figures following, to-wit:

"January 3, 1934.

Mr. C. E. Waggoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.

Dear Sir: Re: Red Cab Company.

We regret to be compelled to advise that as per understanding we submitted this risk to the St. Paul Mercury Indemnity Company and also the National Casualty Company, both of whom we represent, and have a declination from each of the institutions.

Unfortunately, we do not have any other facilities for handling this class of business.

We are returning herewith the payroll report statement which you left as a guide for submission.

Regretting our inability to serve, however, thanking you for the opportunity we beg to remain,

Very truly yours,

MSH:T MYRON S. HARLAN.
Enclosure."

Said letter was received by the said Clifford E. Waggoner at his office in Indianapolis, Indiana, in the forenoon of January 4, 1936, and before the hour of twelve o'clock noon Standard Time of that day.

16. That said Clifford E. Waggoner, after receipt of the letter dated January 3, 1934, from Myron S. Harlan, set forth in finding 15, communicated by letter with Myron S. Harlan, which letter notified said Myron S. Harlan that Clifford E. Waggoner had interpreted Harlan's letter of January 3, 1934, as a refusal to issue a regular policy

of insurance by the petitioner and not as a cancellation of the binder contract of insurance; that neither the respondent nor Clifford E. Waggoner received from Myron S. Harlan or the petitioner during the 30-day period from December 30, 1933, any correspondence other than Harlan's letter of January 3, 1934, set forth in paragraph 15 herein.

17. On January 4, 1933, the aforesaid Myron S. Harlan, for the petitioner, wrote and deposited in the United States mails at Indianapolis, Indiana, addressed to the said Clifford E. Waggoner, a letter relating to the binder contract here involved, which letter is in the words and figures following, to-wit:

"January 4th, 1933.

Mr. C. E. Waggoner,
c/o Aetna Casualty Company,
Illinois Building,
Indianapolis, Indiana.

Dear Sir: Re: Red Cab Company.

Will you kindly return to us the binder given you in connection with the above captioned, and oblige.

Yours very truly,

MSH:T MYRON S. HARLAN."

The said Waggoner denies that he received or ever saw said letter. (Tr., pp. 17-25.)

CONCLUSIONS OF LAW

The District Court stated the following conclusions of law:

1. That said Clifford E. Waggoner was the agent of the respondent for the purpose of notice to the respondent from the petitioner of the cancellation of said written

binder contract sued on herein and is the person intended and referred to by the parties hereto by the words "or his agent placing the insurance," appearing in said binder contract.

2. That the petitioner's aforesaid letter subscribed by said Myron S. Harlan, dated January 3, 1934, and received by said Clifford E. Waggoner on January 4, 1934, did not constitute a notice of cancellation of such binder contract of insurance.

3. The law in this case is with the respondent.

4. The respondent is entitled to recover from the petitioner the sum of Eleven Hundred Sixty-Two Dollars and Ninety-Eight Cents ($1162.98). (Tr., p. 25.)

The petitioner at the time of the making and filing of the conclusions of law excepted to each conclusion of law numbered 1, 2, 3 and 4, separately. (Tr., p. 25.)

Both before (Tr., p. 18) and immediately after (Tr., p. 25) the making and filing of the special findings of fact and conclusions of law the petitioner requested the District Court to make and state the following conclusions of law (Tr., p. 27):

First. That the petitioner's letter in writing dated January 3, 1934, subscribed and despatched on petitioner's behalf to Clifford E. Waggoner and by said Waggoner received on January 4, 1934, was a good and sufficient notice of the cancellation of the written binder contract sued on in this action.

Second: That the written binder contract sued on in this action was cancelled by the petitioner pursuant to its

terms, on January 4, 1934, and at the hour of twelve o'clock noon Standard Time of said day.

Third: That said Clifford E. Waggoner was constituted by respondent the agent of respondent to accept notice on respondent's behalf on January 4, 1934, of the cancellation of said written binder contract sued on herein.

Fourth: That the written binder contract sued on in this action was not in force when the injuries and any of the injuries to the respondent's employees, involved in this action, occurred.

Fifth: The law in this action is with the petitioner.

The District Court refused to make any of the petitioner's requested five conclusions of law, to which action of the Court the petitioner at the time excepted, separately, as to each conclusion of law. (Tr. p. 29.)

The petitioner's request for specific conclusions of law and its exception to the District Court's refusal to state its requested conclusions of law and the petitioner's exceptions to the Court's conclusions of law on the special findings were brought into the record by a bill of exceptions filed September 1, 1936. (Tr. pp. 26-30.)

The District Court, on June 19, 1936, rendered judgment on the special findings of facts and conclusions of law in favor of the respondent for the sum of $1,162.98 and costs. (Tr. p. 26.)

The errors assigned and relied upon in the Circuit Court of Appeals were:

1. The District Court erred in refusing to make the declarations of law requested by the petitioner by its requested conclusions of law numbered First, Second, Third,

Fourth and Fifth, and each of them, upon the special findings of facts.

2. The District Court erred in its conclusions of law numbered 2, 3 and 4, and each separately thereof on the special findings of fact, to each of which the petitioner excepted.

3. The facts found and stated by the District Court in its special findings of facts do not support and sustain the judgment of the District Court in favor of the respondent.

4. The District Court erred in rendering a judgment for the respondent, because the facts found and stated by the court show that the contract sued on by the respondent was cancelled and terminated prior to the occurrence of the losses, and any of the losses, alleged in the second amended complaint.

5. The District Court erred in giving and rendering judgment for the respondent, because the facts found and stated by the Court in its special findings of fact do not support, and fail to sustain, the judgment, and the law is with the petitioner on the special findings of fact, because the special findings do not sustain the material allegations of the second amended complaint. (Tr. pp. 31-32.)

SPECIFICATION OF ERRORS IN THE SUPREME COURT

1. The Circuit Court of Appeals erred in holding that federal jurisdiction was not to be determined by the state of the record as to the amount in controversy as shown by the record in the State court at the time of removal,

but instead was to be determined *by the amendment of the complaint after removal to the federal District Court.*

2. The federal question of federal jurisdiction here involved was decided by the Circuit Court of Appeals in a way not in accord with the decisions of the Supreme Court, applicable here; namely, *Kirby v. American Soda Fountain Co.*, 194 U. S. 141 and *Cooke v. United States*, 2 Wall. 218.

3. The Circuit Court of Appeals erred in refusing to decide the questions raised by petitioner's assignment of errors concerning the District Court's conclusions of law on the special findings of fact, the insufficiency of the facts specially found to sustain the judgment and the right of the petitioner to have judgment ordered to be rendered for petitioner on the special findings of fact and the re-stated conclusions of law sought by petitioner thereon.

4. The Circuit Court of Appeals erred in failing to hold that the facts found by the District Court's special findings of fact were insufficient to sustain the judgment in favor of respondent.

5. The Circuit Court of Appeals erred in overruling petitioner's petition for a rehearing.

SUMMARY OF THE ARGUMENT

1. The Circuit Court of Appeals erred in holding that federal jurisdiction was not shown by the record in this cause, in ordering the case remanded to the State Court, and in refusing to consider petitioner's assignments of error, because:

(a) Federal jurisdiction, once acquired, is not taken away by an amendment of the complaint in the federal court reducing the amount demanded below $3,000.

(b) Federal jurisdiction existed while the case was pending in the State court and at the time of the removal of this cause, because (1) the action was at law for the recovery of unliquidated damages for the breach of a written contract, (2) the amount provided by the contract was unlimited, and (3) the respondent, as plaintiff, alleged damages in the sum of $4,000 and (4) prayed for judgment in that amount.

(c) The amendment of the complaint by the filing of a bill of particulars, for the first time, in the District Court, showing the damages of the respondent then demanded to be less than $3,000 did not destroy the federal jurisdiction which theretofore properly had attached.

2. The Circuit Court of Appeals should have decided petitioner's assignments of error, reversed the judgment of the District Court, and ordered the District Court to restate its conclusions of law and render judgment for petitioner, because:

(a) The written binder contract of insurance was cancelled pursuant to its terms, by petitioner, prior to the occurrence of any of the losses sued for by respondent, as shown by the special findings of fact.

(b) The special findings of fact do not establish the contract sued on, in this, that there was no finding of the terms and conditions of the regular policy of petitioner, whereas the written binder expressly provided that it was subject to all the terms and conditions of the regular policy of petitioner.

ARGUMENT

COMPLETE JURISDICTION IS SHOWN BY THE RECORD

Since, as here, the complaint on file in the State court at the time of removal of the federal court was sufficient to confer federal jurisdiction, the subsequent amendment of the complaint by the respondent in the federal court, after the case was docketed in the federal court, by reducing the amount of respondent's damage did not deprive the federal court of jurisdiction; that is to say, *federal jurisdiction depends upon the state of the record at the time the petition for removal is filed.*

The decision of the Circuit Court of Appeals is not in accord with the following applicable decisions of the Supreme Court:

In *Kirby v. American Soda Fountain Co.*, 194 U. S. 141, 24 S.Ct. 619, at page 621, the Supreme Court, in an opinion by Mr. Chief Justice Fuller, said that—

> "* * * it is the general rule that when the jurisdiction of a Circuit court of the United States has once attached it will not be ousted by subsequent change in the conditions."

In the Kirby case the Supreme Court reviewed previous cases decided by it, approved them, and in stating the effect of the holdings of the court in prior cases said, at page 621,—

> "In *Cooke v. United States*, Mr. Chief Justice Chase said that 'jurisdiction once acquired cannot be taken away by any change in the value of the subject of controversy.'"

Further, in its opinion in the Kirby case, at page 621, the Supreme Court referred to a District Court case announcing the same principle and said:

> "In *Roberts v. Nelson*, the amount claimed was reduced after the case had been removed, and Mr. Justice Blatchford, then District Judge, held that the jurisdiction of the court having once attached, no subsequent event could divest it."

The Kirby case (194 U. S. 141) was one in which the complaint in the State court, at the time of the removal, averred the amount in controversy to be within the jurisdiction of the federal court, as is true in the case at bar. The case was properly removed. While the case was pending in the federal court the defendant filed a cross-complaint against the plaintiff and sought to recover from the plaintiff an amount less than the amount essential to federal jurisdiction. Thereupon the plaintiff dismissed his complaint, so that there remained pending before the court, as the sole pleading seeking affirmative relief, the cross-complaint of the defendant for an amount less than the amount essential to federal jurisdiction. The Supreme Court held, however, that there was federal jurisdiction and sustained a judgment on the cross-complaint in an amount less than the amount essential to federal jurisdiction.

In *Cooke v. United States*, 2 Wall. 218, 219, 17 L. Ed. 755, the plaintiff offered a remission of so much of his claim as would make the claim remaining less than the amount necessary to confer federal jurisdiction. The offer of remission was made upon condition of payment of the remainder. The plaintiff's offer was not accepted by the defendant. The Supreme Court, in an opinion by Mr. Chief Justice Chase, holding in favor of federal jurisdiction, said,—

> "It does not appear that the proposition has been accepted; and if not, the amount in controversy remains unaffected. But had the alleged reduction been made by an actual payment, the jurisdiction of the court would not be affected. The jurisdictional facts existed at the time of issuing and serving the writ of error. By its issuance and service the court obtained jurisdiction over the cause, and this jurisdiction once acquired, cannot be taken away by any change in the value of the subject of controversy."

Applying the foregoing applicable decisions of the Supreme Court to the facts in the case at bar, it will be clearly seen that the decision of the Circuit Court of Appeals is erroneous and not in accord with the decisions of the Supreme Court.

In *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, at page 9, the Sixth Circuit, in an opinion by Circuit Judge Lurton, said:

> "Whatever the facts of the plaintiff's claim, and however he may have stated his demand before commencing suit, he voluntarily chose to begin a suit upon a claim which, in amount, was within the jurisdiction of the Circuit court, and therefore removable. Whether the facts would or would not support his claim as stated, or for the amount he demanded, is a matter of no moment. *Jurisdiction to hear and determine that claim existed in the Circuit Court to which the cause was removed, and the jurisdiction thus acquired could not be defeated by any subsequent amendment of his pleadings, bill of particulars, or other form of concession as to any part of his demand.*" (Italics ours.)

In *Twin Hills Gasoline Co. v. Bradford Oil Corp.*, 264 Fed. 440 (D. C.), the court quoted from the case of *Johnson v. Computing Scale Co.*, (D. C.) 139 Fed. 339, and approved the following:

> "Where the amount claimed by a plaintiff in his complaint in a state court, and which he is entitled to recover if its allegations are true, is sufficient to give a federal court jurisdiction, and the cause is otherwise removable, he cannot defeat such jurisdiction after removal by changing his position or the record with respect to the amount claimed."

After quoting the foregoing from the Johnson case, the court in the Twin Hills Gasoline Company case then said:

> "The claim as made and standing on the record of the case at the time removal is effected is what determines the jurisdiction of the United States Court.
> * * *
>
> "The motion to remand, after the case had been removed to this court and the plaintiff had filed an amendment reducing the amount sued for below $2,000.00, exclusive of interest and costs, was submitted to District Judge Youmans, assigned to this District, and the same was by him overruled. The motion to remand is now renewed by the plaintiff, and the same is overruled."

In *Travelers' Protective Assn. v. Smith,* 71 Fed. (2d) 511 (4 CCA), the plaintiffs commenced their suit in the State court, and in their complaint in the State court they sought to recover $5,000. After the case had been removed to the federal court, and after the defendant had answered the complaint, the plaintiffs filed in the federal court a written waiver of their right to recover on the cause of action alleged any amount in excess of $3,000 and remitted to the defendant any excess which they might be entitled to recover in excess of that amount. The plaintiffs then moved that the cause be remanded to the State court on the ground that such remittitur had been filed. The Circuit Court of Appeals for the Fourth Circuit held that

the jurisdiction of the federal court was not defeated, or the removal rendered improper, by the remittitur subsequently filed. The Court of Appeals, at page 512, said:

> "As the action involved more than $3,000.00 and was wholly between citizens of different states, it was properly removed into the federal court and the jurisdiction of that court attached. And it is perfectly clear that the jurisdiction was not defeated or the removal rendered improper by the remittitur subsequently filed."

The decision of the Circuit Court of Appeals in the case at bar fixes for all the District Courts in the entire Seventh Circuit the rule that, notwithstanding a case removed is a removable one at the time of the removal, involving an amount in controversy beyond $3,000, if after removal the plaintiff chooses to amend his complaint in the federal court by reducing his allegation of damages to, or below, $3,000, the District Court must thereupon remand the case to the State court. The defendant whose case is so remanded will thus have lost forever his right to have his cause determined by the federal court. Such a defendant is thus cast without a remedy. He cannot appeal to the Circuit Court of Appeals to correct the error. He cannot come to this court for a writ of *certiorari* to correct the error against him and to secure his rights under the Acts of Congress and the federal Constitution giving him the right to have his case decided by the national courts. Every such defendant in the Seventh Circuit is now remediless. This should not be. Only this court, in the case at bar, can correct such an error and avoid such an injustice.

Cases are numerous and frequent where a cause removable as alleged in the State court is removed, in which, after the statute of limitations has run to bar a fresh action,

the federal District Court has sustained a demurrer to the plaintiff's complaint or reply or overruled plaintiff's demurrer to an affirmative answer, to the displeasure of the plaintiff's counsel. That plaintiff has found that the federal court has determined that the law is against the plaintiff. Now, under the existing decision of the Circuit Court of Appeals in the case at bar, all that the plaintiff in such case need do, to abandon a jurisdiction he has found unfavorable, and try his luck in another court, is to amend his complaint by reducing his allegation and demand of damages to $3,000, whereupon the federal District Court will be required to send the case to the State court. The right of a defendant to enjoy the exercise of federal jurisdiction in a removable case properly removed is a substantial right. The courts should not, and do not, favor experimenting by a party to litigation, first in one court, then in another, until perchance he may find a court that shall agree with him. A defendant properly in the federal court with his case and entitled to remain there for final decision on the merits should not be thrust out of the federal court by the expedient of the plaintiff's amending his complaint by reducing his demand because merely the plaintiff in the given case has become informed that the federal court considers he has no right to recovery.

In the case at bar, the petitioner is entitled to have its case—the case made by the record in this cause—decided by the federal court. The Court of Appeals has denied petitioner that right. It has refused to pass on simple questions of merits presented by the errors assigned in the Circuit Court of Appeals. It has relegated petitioner to the State court. Petitioner beseeches this Court to preserve to petitioner the right to have its case on the merits decided by the federal courts, as is its due.

The Circuit Court of Appeals, in deciding there is no jurisdiction in the case at bar, relied on two cases, inapplicable here, decided by this Court, namely:

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 56 Ct. 780;

KVOS, Inc., v. Associated Press, 299 U. S. 269, 57 S. Ct. 197.

We submit that neither of the cases cited and relied on by the Court of Appeals is in point here because:

1. The case at bar, as alleged by the complaint in the State court, was one at law for the recovery of unliquidated money damages laid by the complaint in the sum of $4,000, commenced in the State court and removed to the federal court, on a contract under which $4,000 was recoverable.

2. The case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 56 S. Ct. 780, was solely for equitable relief by injunction to restrain the enforcement of a State statute, and not for the recovery of money damages. It was commenced originally in the federal court, not in the State court, and was not a removal case. As to amount in controversy, jurisdiction in the McNutt case was rested solely on—

> "* * * the value of the object or right to be protected against interference."

Said this court, in its opinion:

> "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that sub-

> ject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000.00. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

The McNutt case is thus seen instantly to be wholly irrelevant to the case at bar.

3. In the case of *KVOS, Inc., v. Associated Press,* 299 U. S. 269, 57 S. Ct. 197, also the plaintiff invoked the original jurisdiction of the federal court, in equity, for injunctive relief. The case was not commenced in the State court, and was not removed to the federal court. This Court stated, in summary, the allegations of the bill as follows:

> "Respondent is a New York corporation and petitioner a Washington corporation; 'the damage to which complainant is being subjected * * * is in excess of the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.' "

The plaintiff in the KVOS suit sought to enjoin the defendant, in the operation of defendant's radio station, from pirating news from members of the plaintiff Associated Press. Upon a hearing for a temporary injunction, the District Court dismissed the bill for want of federal jurisdiction.

The defendant, in the KVOS case, challenged the plaintiff's allegations of the amount alleged to be in controversy, this court saying that,—

"The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. * * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof.'"

This court held that the plaintiff in the KVOS case had wholly failed to meet that burden.

Speaking further of the bill in the KVOS case, this Court said:

"The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right. The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess of that sum. Such a formal allegation is sufficient, unless the bill contains others which qualify or detract from it in such measure that when all are considered together it cannot fairly be said that jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte* or upon the defendant's motion. In this case the formal allegation is not re-enforced or strengthened by other portions of the complaint; neither is it neutralized or weakened by qualifying or detracting allegations. In effect it stands alone. Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; though it might, of its own motion, have entered upon an inquiry to ascertain whether the cause was one over

which it had jurisdiction. But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof."

4. In the case at bar there was no challenge by either party of the jurisdictional allegations of either the complaint in the State court or the petition for removal, both of which alleged the amount in controversy to be $4,000, and nothing in the original complaint in the State court or in the petition for removal contradicted, or tended to contradict, the allegation that the amount in controversy was $4,000, exclusive of interest and costs. In no manner did either party in the case at bar present any issue of jurisdiction because of amount in controversy or for any other reason.

Very clearly there is jurisdiction in the case at bar, and the cause should not be remanded to the State court.

CIRCUIT COURT OF APPEALS SHOULD DECIDE PETITIONER'S ASSIGNMENT OF ERRORS

When the Circuit Court of Appeals, finding first that federal jurisdiction was not shown by the record then before it when it gave its original opinion, afterwards had brought before it, on the return to its writ of *certiorari*, the transcript on removal containing the complaint filed in the State court, and the petition for removal, which showed the amount in controversy to be $4,000, and that federal jurisdiction was therefore present, the Circuit Court of Appeals should have decided petitioner's assignment of errors on the merits. When it refused to do so, it placed its refusal on an untenable ground.

The Circuit Court of Appeals furthermore should have given the reasons on which it rested its final judgment

that there was absence of federal jurisdiction, after it had brought before it, on *certiorari*, the transcript on removal.

A somewhat similar situation arose in *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257. In that case the Circuit Court of Appeals failed to consider the case before it, placing its refusal on an untenable premise (not important here). This Court, remanding the case to the Circuit Court of Appeals (p. 268) "to the end that the duty to hear and decide it may be performed," said (p. 67) that—

> "* * * we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

The same has occurred in this case. The Circuit Court of Appeals, in refusing to decide petitioner's assignments of error, has misconstrued the record as to the amount in controversy, and has deprived the petitioner of its right, under the Acts of Congress, to have its cause decided by the federal courts.

In *Buzynski v. Luckenbach Steamship Co., Inc.*, 277 U. S. 226, at page 228, this Court said:

> "Where the Circuit Court of Appeals erroneously reverses a judgment upon one question without deciding another upon which its correctness also depends, the case may be reversed for the error and remanded to that court for decision of the other question."

In *Baltimore, etc., R. Co. v. United States*, 279 U. S. 781, 787, this Court said:

> "The lower court entered its decree dismissing the suit and, after reversal here, denied restitution without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given the reasons on which they rested their decisions. * * *"

It is the contention of petitioner that if the Circuit Court of Appeals had considered petitioner's assignment of errors it would have been compelled to hold that the facts found by the special findings of facts by the District Court are not sufficient to sustain the judgment against petitioner, and that petitioner is entitled to have the judgment appealed from reversed, the District Court's conclusions of law re-stated in favor of petitioner, and judgment thereon rendered in favor of petitioner.

Petitioner submits that the case should be remanded to the Circuit Court of Appeals for a decision of petitioner's assignments of errors; or that the cause be decided by this court on its merits upon further consideration.

THE MERITS OF THE CASE

The assured's broker, Waggoner, was duly authorized, by respondent, to receive, for respondent, notice of the cancellation of the binder sued on. The provision of the binder fixing the *time* for the termination of the insurance following receipt of notice of cancellation is entirely reasonable and valid. This was expressly so decided in *Lippman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 24 N. E. 699, 700.

The letter of the insurer's agent, Harlan, informs the assured's broker of what? Of the following facts:

(a) That "this risk" was submitted to the petitioner.

(b) That the risk was even submitted to another insurer, namely, the National Casualty Company.

(c) That the submission of the risk to both such companies was pursuant to the understanding between the assured's broker and the petitioner's agent.

(d) That the petitioner as well as the National Casualty Company declined the risk.

"This risk" was submitted to the petitioner, and "this risk" was declined by petitioner. The petitioner's declination was of the risk.

As showing the finality of the declination of the risk by petitioner, the petitioner's agent informed the broker that the agent did—

> "not have any other facilities for handling this class of business."

Still further to communicate to the assured's broker the complete ending of the initiated transaction, the agent of petitioner, with his notice of the petitioner's declination of the risk, returned the pay roll statement of the assured which the assured's broker—

> "left as a guide for submission"

of the risk to the petitioner.

Still further to leave no doubt of the finality of the declination of the tendered risk, the petitioner's agent, in his letter to the assured's broker, said that he regretted—

> "our inability to serve,"

but thanked the broker for the fruitless opportunity.

What "risk" was submitted to petitioner? What "risk" did petitioner decline? Clearly the risk mentioned in the written binder, which risk was (a) to indemnify against

loss by reason of workmen's compensation (b) for 30 days, but subject to cancellation before the end of such 30 days.

The respondent, by this binder, gave the petitioner the absolute right to cancel the 30-day binder merely by notice to the respondent or its broker. The binder was, by the agent of petitioner, issued upon the express condition that the petitioner should have the right to cancel the binder if, for any reason whatever, the petitioner chose to cancel it. The importance and the urgency of the right to cancel is disclosed by the facts (a) that the notice is not even required to be in writing, and (b) the cancellation is effective at the hour of 12 o'clock noon immediately following the receipt of the notice of cancellation. Thus cancellation at 12 o'clock noon may be effected by a telephone call to the respondent or its broker made but 5 minutes before such hour of 12 o'clock noon.

A right so important as the granted and reserved right of cancellation will not be destroyed or withheld by any insubstantial objection to the notice of the intention to exercise such right. The binder prescribes no form of notice, prescribes no words to be spoken or written when the termination of the risk is desired by the insurer. If the notice reasonably and fairly informs definitely that the insurer declines the risk, surely then the notice is sufficient to effect cancellation. The law does not require more. The notice in the case at bar surely so informs. When the agent's letter informed that the risk assumed by the binder was submitted to the petitioner, and was by the petitioner declined, and when the Cab Company's pay roll statement was returned by the insurer's agent to the broker, surely no man of ordinary intelligence could fail to understand that "the risk" was declined. If a submitted risk is declined, it certainly is at an end if the right to decline it

is reserved. It is "this risk" that is declined, and it is "this risk" that is mentioned expressly in the notice of cancellation.

Workmen's compensation risks are perilous. Few insurers will assume them at all; and the few who do are most circumspect and selective. Taxicab companies are peculiarly hazardous. This fact is shown by our agent's letter, which shows (a) that he so doubted our willingness to accept this risk that he inquired also of the National Casualty Company whether it would consider taking the risk; and which shows further that both companies declined the risk. The agent so far despaired of obtaining any company to assume this risk that he even returned the assured's pay roll statement, which was the basis for the insurance sought by the Cab Company, and confessed his entire inability to obtain any insurer to carry respondent's risk.

Fairly considered, and reasonably construed, the notice here appears to us to be entirely sufficient to inform the respondent that we declined the risk tendered to us by this binder.

These notices of cancellation are prepared by practical men, insurance agents, not lawyers. They are communicated to practical men, frequently, as in this case, to insurance brokers, who clearly understand the import of just such notices. A greater nicety in the choice of language would nullify the greater number of notices of binder cancellations. We submit that the notice in this case is definite and altogether sufficient, and that the liability of petitioner terminated before respondent had suffered any losses.

The notice of cancellation dated January 3, 1934, and which was received by the broker before any of the work-

men of the appellee suffered any injuries at all, was either a sufficient notice of cancellation, or it was not a sufficient notice of cancellation; and such notice either terminated, or did not terminate, the risk. If the notice was in fact a sufficient notice of cancellation, and if by the receipt of such notice the binder was cancelled, then, of course, any subsequent declaration by the broker to the petitioner's agent that he understood the notice to mean something that it did not say, can have utterly no effect in making liability here against the petitioner. If, as we contend, the binder was cancelled at 12 o'clock noon following the receipt of the notice of cancellation, then no liability could be created against this petitioner unless there were subsequently a contract of insurance entered into, which there was not. There is no issue of waiver or estoppel in the case, and no contract can be effected by the principle of waiver or estoppel, but, instead, a contract can result only from an agreement of the parties. The broker's communication to the agent of the petitioner sometime after the cancellation was consummated by the giving of this notice is utterly of no legal effect. This elementary and well understood principle is well illustrated by the case of *McCoy v. Northwestern Mut. Relief Assn.*, 92 Wis. 577, 66 N. W. 497, in which it was claimed that the conduct of the insuring association, in dealing with the deceased, was such as to indicate a belief on the part of the deceased insured that in the event of death by suicide that fact would not be insisted upon as a defense, notwithstanding the provisions of the contract that death by suicide was excepted and not insured against, and that the assured relied upon such contract by refusing to exchange his certificate for one of the new series in which such exception of liability was omitted, and paid assessments on the contract containing the provision against liability for death by suicide.

Of such insistence by counsel for the plaintiff in the McCoy Case the Wisconsin Supreme Court said:

> "We do not understand that the doctrine of estoppel or waiver goes that far."

Illustrating the point of its decision the Wisconsin Court said:

> "To illustrate the principle here laid down, a policy of insurance against loss by fire cannot have ingrafted upon or added to it, by way of estoppel or waiver, provisions for insurance against loss by any other cause; and no more can a policy of life insurance, expressly limited to payment of a sum of money in the event of death from causes other than suicide or self-destruction, be broadened out by the application of the law of waiver or estoppel so as to cover the cause excluded under the contract. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all."

And so, in the case at bar, if the contract was terminated, brought to an end, cancelled, by the notice of cancellation, there was after that moment no contract, unless the parties afterward met and agreed upon a new contract of insurance,—which here they did not do.

The same principle is exemplified by the Supreme Court of Alabama in *Protective Life Ins. Co. v. Cole* (Ala.), 161 So. 818, in which case the court, at page 819, said:

> "This doctrine (of waiver), however, cannot be invoked by the insured to create such primary liability. To create such primary liability all the elements of a binding contract are essential."

In the case at bar, the special findings of fact do not disclose that there was any contract or any attempt to make a contract after the notice of cancellation was communicated to the broker of the Cab Company. We repeat that this found fact of a false interpretation by the assured's broker is utterly of no legal consequence in the case at bar, and cannot have the effect to destroy the effectiveness of the notice of cancellation if and when, as a matter of law and fact, the notice of cancellation were sufficient as such.

THE CONTRACT SUED ON WAS NOT ESTABLISHED

The conditions of the usual policy of the petitioner were made conditions of the binder, but such conditions were not found and set forth in the special findings of facts, and in fact were not alleged by the respondent in its complaint.

The District Court has *failed to find* an essential fact, namely, the conditions and terms of the usual policy of petitioner which became, by reference, conditions and terms of the skeleton binder. The District Court did not find what such conditions were, or that they were not material, nor that the material provisions of the contract of insurance were set forth in the binder. What the District Court did find was that the parties agreed, by a written binder, for workmen's compensation insurance upon and subject to—

"all the terms and conditions of the regular policy,"

but failed to find what were those conditions the parties so deemed material, and failed to find whether such conditions, or any of them, were performed by respondent.

Clearly the law is not with petitioner on special findings so signally lacking. Shall a plaintiff succeed who fails to show he has performed conditions precedent of the very contract on which he relies, and who fails even to show what such conditions in fact were? We think not.

WHEREFORE petitioner prays that the judgment of the Circuit Court of Appeals be reversed and that the Court of Appeals be directed to consider and decide petitioner's several assignments of error; or, if this court shall consider the merits of the case, that the judgment of the Circuit Court of Appeals and of the District Court be reversed, that the District Court be ordered to restate its conclusions of law in favor of petitioner and to render judgment in favor of petitioner on the special findings of fact and conclusions of law.

Respectfully submitted,

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Indianapolis, Indiana,
Counsel for Petitioner.

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1936

SAINT PAUL MERCURY INDEMNITY COMPANY,
Petitioner,

vs.

RED CAB COMPANY,
Respondent.

No. 274

CONSENT OF RESPONDENT THAT WRIT OF CERTIORARI APPLIED FOR BE GRANTED

The respondent in the above entitled cause confesse the error of the United States Circuit Court of Appeals for the Seventh Circuit in holding, in the above cause, that the Federal Court had no jurisdiction of said cause, consents that the writ of *certiorari* applied for be granted; that the judgment of the said United States Circuit Court of Appeals for the Seventh Circuit be reversed and that this cause be remanded to the said Circuit Court of Appeals with a direction by this Court that the said Circuit Court of Appeals proceed to the decision of said cause on the merits; and respondent will ever pray.

JOHN C. RUCKELSHAUS.
JOHN K. RUCKELSHAUS.
RUCKELSHAUS & RUCKELSHAUS,
Attorneys for Respondent,
RED CAB COMPANY.

SUPREME COURT OF THE UNITED STATES.

No. 274.—October Term, 1937.

Saint Paul Mercury Indemnity Company, Petitioner, *vs.* Red Cab Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 28, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The decision under review is that, although, at the time of removal of a cause from a state court, the complaint disclosed an amount in controversy requisite to the federal court's jurisdiction, a subsequent amendment, reducing the sum claimed to substantially less than that amount, necessitates remand to the state court. We granted the writ of certiorari because of alleged conflict with our decisions and with those of other federal courts.

The respondent, a corporation of Indiana, issued a summons out of the Superior Court of Marion County, Indiana, against the petitioner, a Minnesota corporation doing business in Indiana, and one Harlan as its agent. The complaint alleged that the respondent was subject to the provisions of the Indiana Workmen's Compensation Act and had entered into a contract of insurance with the petitioner, evidenced by a binder, whereby the petitioner insured the respondent against loss or expense by reason of claims for compensation for a period of thirty days from December 30, 1933, and agreed to act for the respondent in the filing of reports and notices under the Act; that, during the term of the insurance employes of the respondent had suffered injury in the course of employment and made claims therefor; that the petitioner had been notified of each injury and investigated it in connection with the claim for compensation; that after the expiration of the contract the petitioner notified the respondent that it would not recognize any of the claims and denied liability under the binder; that as a consequence respondent was compelled to employ attorneys, investigators, and medical assistants to investigate and satisfy claims

covered by the contract and to pay employes who had suffered injuries during the contract period, and to pay, or obligate itself to pay, for medical, hospital, or dental bills in connection with such injuries; to the damage of the respondent in the sum of $4,000. It was alleged that the petitioner had acted, in making the contract, through Harlan, its authorized agent and representative, and an order was prayed that Harlan retain all moneys due by him to the petitioner for the purpose of answering any judgment which might be recovered. The complaint concluded by demanding $4,000 and other appropriate relief. Upon the petitioner's timely application the cause was removed to the United States District Court for Southern Indiana. The respondent thereafter filed an amended complaint, the substance of which is not now material, and later a "second amended complaint for breach of contract and for damages," in which the allegations of the original complaint were repeated and damages were claimed in the sum of $4,000. An exhibit was attached which gave the names of the employes and the amounts expended in connection with their asserted injuries totaling $1,380.89. The court dismissed Harlan as a defendant, transferred the cause to the law docket, and overruled a demurrer to the complaint as not stating facts sufficient to constitute a cause of action. The answer denied the making of the contract. A jury trial was waived and the court made findings, stated its conclusions, and entered judgment for the respondent for $1,162.98. The petitioner appealed. The Court of Appeals refused to decide the merits on the ground that as the record showed respondent's claim did not equal the amount necessary to give the District Court jurisdiction, the case should have been remanded to the State court.[1]

The question presented is one of statutory construction. The act defining the jurisdiction of district courts of the United States is Section 24 of the Judicial Code.[2] So far as here material, the Code confers jurisdiction of a suit of a civil nature, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and is between citizens of different states.

Authority for removal of certain causes from a state to a federal court was first given by Section 12 of the Judiciary Act of 1789[3]

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[1] 90 F. (2d) 229.

[2] Act of March 3, 1911, c. 231, Sec. 24, as amended, 36 Stat. 1091, U. S. C. Tit. 28, § 41.

[3] Act of Sept. 24, 1789, Sec. 12, 1 Stat. 73, 79.

which permitted removal of a civil suit, instituted by a citizen of the state in which the suit was brought, against a citizen of another state, where the matter in dispute exceeded the sum or value of $500, exclusive of costs. Such removal could be had only at the instance of the nonresident defendant. The Act of July 27, 1866,[4] enlarged the privilege of removal by providing that if, in such a civil suit, it was shown that a nonresident defendant was party to a separable controversy, which could be determined without the presence of other defendants, that defendant might remove the cause.

The Judiciary Act of 1875[5] altered preexisting law to permit suits involving a controversy between citizens of different states to be removed by either party. The Judiciary Acts of 1887-1888[6] increased the jurisdictional amount to more than $2,000, exclusive of interest and costs, and confined the right of removal to a nonresident defendant, and the Judicial Code increased the limit to over $3,000, exclusive of interest and costs, and also restricted the privilege to nonresident defendants.[7] The statute governing dismissal or remand for want of jurisdiction is Section 37 of the Code:[8]

"If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

This provision first appeared as Section 5[9] of the Act of March 3, 1875 (*supra*), and save for the elision of a concluding clause, and the substitution of "district court" for "circuit court" is identical with that Section. It was included in the Judiciary Acts of 1887-8,

[4] c. 288, 14 Stat. 306.

[5] Act of March 3, 1875, 18 Stat. 470.

[6] Act of March 3, 1887, Sec. 1, 24 Stat. 552; Act of Aug. 13, 1888, Sec. 1, 25 Stat. 433.

[7] Act of March 3, 1911, c. 231, Secs. 24 and 28, 36 Stat. 1087, 1091, 1094.

[8] Act of March 2, 1911, c. 231, Sec. 37, 36 Stat. 1098, U. S. C. Tit. 28, § 80.

[9] 18 Stat. 472.

supra, and has been continuously in force since 1875. It altered the practice by requiring the court to dismiss or remand of its own motion in a proper case although want of jurisdiction was not raised by appropriate motion or by plea or answer,[10] but did not change the substantial basis for the court's action. The principles governing dismissal of a cause initiated in the federal court or the remand of one begun in a state court have remained as they were before the section was adopted.

The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls[11] if the claim is apparently made in good faith.[12] It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.[13] The inability of plaintiff to recover an amount adequate to give the court

[10] Prior to 1875 the courts did not act of their own motion, but upon a motion to dismiss or a plea in abatement. Smith *v.* Kernochen, 7 How. 198; McNutt *v.* G. M. &c. Corp., 298 U. S. 178, 183. Since then it has been their duty not only to act upon a motion to dismiss, (Steigleder *v.* McQuesten, 198 U. S. 141) or, if the state practice permits, upon a denial of jurisdiction in the answer, (Gilbert *v.* David, 235 U. S. 561; North Pac. S. S. Co. *v.* Soley, 257 U. S. 216) but to act *sua sponte* (McNutt *v.* G. M. &c. Corp., *supra*, 184) upon any disclosure, whether in the pleadings or the proofs, which satisfies the court, in the exercise of a sound judicial discretion, that the plaintiff did not in fact have a claim for the jurisdictional amount or value, and knew, or reasonably ought to have known, that fact. Williams *v.* Nottawa, 104 U. S. 209, 211; McNutt *v.* G. M. &c. Corp., *supra*, 184. It is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction, in view of the nature of the right asserted, and, if appropriately challenged, or if inquiry be made by the court of its own motion, to support the allegation. McNutt *v.* G. M. &c. Corp., *supra*, pp. 182-189; KVOS *v.* Associated Press, 299 U. S 269. Even an appellate court must notice the absence of the elements requisite to original jurisdiction or to a removal. Williams *v.* Nottawa, *supra;* Robinson *v.* Anderson, 121 U. S. 522; McNutt *v.* G. M. &c. Corp., *supra;* American Bridge Co. *v.* Hunt, 130 Fed. 302; International & G. N. R. Co. *v.* Hoyle, 149 Fed. 180.

[11] Wilson *v.* Daniel, 3 Dall. 401, 407, 408; Barry *v.* Edmunds, 116 U. S. 550; Sherman *v.* Clark, 3 McLean 91, Fed. Cas. 12763; Stuckert *v.* Alexander, 4 F. Supp. 173.

[12] Peeler *v.* Lathrop, 48 Fed. 780; Ung Lung Chung *v.* Holmes, 98 Fed. 323; Washington County *v.* Williams, 111 Fed. 801; Greene County Bank *v.* Teasdale Co., 112 Fed. 801; American Sheet & Tin Plate Co. *v.* Winzeler, 227 Fed. 321; Bruner Co. *v.* Manefee Co., 292 Fed. 985; Walker Grain Co. *v.* Southwestern Tel. & Tel. Co., 10 F. (2d) 272.

[13] Barry *v.* Edmunds, *supra;* Wetmore *v.* Rymer, 169 U. S. 115, 122; Put-In-Bay Water Works Co. *v.* Ryan, 181 U. S. 409, 432-3; Hampton Stave Co. *v.* Gardner, 154 Fed. 805.

jurisdiction does not show his bad faith or oust the jurisdiction.[14] Nor does the fact that the complaint discloses the existence of a valid defense to the claim.[15] But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed.[16] Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.[17]

What already has been said, and circumstances later to be discussed lead to the conclusion that a dismissal would not have been justified had the suit been brought in the federal court. The principles which govern remand of a removed cause, more urgently require that it should not have been remanded. In a cause instituted in the federal court the plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to

[14] Smithers *v.* Smith, 204 U. S. 632; Holden *v.* Utah & M. Co., 82 Fed. 209; Maffet *v.* Quine, 95 Fed. 199; Kunkel *v.* Brown, 99 Fed. 593; Ung Lung Chung *v.* Holmes, *supra;* Washington County *v.* Williams, *supra;* Denver City Tramway *v.* Norton, 141 Fed. 599; Hampton Stave Co. *v.* Gardner, *supra;* Lewis Mercantile Co. *v.* Klepner, 176 Fed. 343; St. Tammany Bank *v.* Winfield, 263 Fed. 371; Ragsdale *v.* Rudich, 293 Fed. 182; Walker Grain Co. *v.* Southwestern Tel. & Tel. Co., 10 F. (2d) 272; Kimel *v.* Missouri State Life Ins. Co., 71 F. (2d) 921; Simecek *v.* U. S. Nat. Bk., 91 F. (2d) 214.

[15] Interstate B. & L. Assn. *v.* Edgefield Hotel Co., 109 Fed. 692; Armstrong *v.* Walters, 219 Fed. 320; Mullins Lumber Co. *v.* Williamson Land Co., 246 Fed. 232.

[16] Williams *v.* Nottawa, *supra;* Barry *v.* Edmunds, *supra;* Vance *v.* Vandercook Co., 170 U. S. 468; Lien Bonding Co. *v.* Karatz, 262 U. S. 77; First National Bank *v.* Louisiana Highway Com., 264 U. S. 308; Simon *v.* House, 46 Fed. 317; Horst *v.* Merkley, 59 Fed. 502; Cabot *v.* McMaster, 61 Fed. 129; Bank of Arapahoe *v.* Bradley & Co., 72 Fed. 867; Armstrong *v.* Walters, *supra;* Maurel *v.* Smith, 220 Fed. 195; LeRoy *v.* Hartwick, 229 Fed. 857; Sclarenco *v.* Chicago Bonding Co., 236 Fed. 592; Operators Co. *v.* First Wisconsin Trust Co., 283 Fed. 904; Wilderman *v.* Both, 17 F. (2d) 486; Chick *v.* New England Tel. Co., 36 F. (2d) 832; Nixon *v.* Town Taxi, Inc., 39 F. (2d) 618; Cohn *v.* Cities Service Co., 45 F. (2d) 687; Miller-Crenshaw Co. *v.* Colorado Mill Co., 84 F. (2d) 930.

[17] Mutual Life Ins. Co. *v.* Rose, 294 Fed. 122; Hood *v.* Bell, 84 F. (2d) 136.

give jurisdiction there is no injustice in dismissing the suit. Indeed, this is the court's duty under the Act of 1875. In such original actions it may also well be that plaintiff and defendant have colluded to confer jurisdiction by the method of the one claiming a fictitious amount and the other failing to deny the veracity of the averment of amount in controversy. Upon disclosure of that state of facts the court should dismiss.

A different situation is presented in the case of a suit instituted in a state court and thence removed. There is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end.[18] For if such were the purpose suit would not have been instituted in the first instance in the state but in the federal court. It is highly unlikely that the parties would pursue this roundabout and troublesome method to get into the federal court by removal when by the same device the suit could be instituted in that court.[19] Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer

[18] In Smith *v.* Greenhow, 109 U. S. 669, a case of trespass for entering plaintiff's premises and carrying away goods of the value of $100, interfering with plaintiff's business, annoying and disturbing him, &c., the damages were laid at $6,000. Though there was not diversity of citizenship, as the pleadings raised a federal question, the cause was removed. It was remanded as the circuit court thought there was no federal question involved. The decision was reversed. Speaking of the facts disclosed the court said: "There is a ground for remanding the cause suggested by the record, but not sufficiently apparent to justify us in resorting to it to support the action of the circuit court. The value of the property taken is stated in the declaration to be but $100, although the damages for the alleged trespass are laid at $6,000. . . . We cannot, of course, assume as a matter of law, that the amount laid, or a less amount, greater than $500, is not recoverable upon the case stated in the declaration, and cannot therefore justify the order remanding the cause, on the ground that the matter in dispute does not exceed the sum or value of $500. But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of Congress, so that, in the words of the 5th section of the act of 1875, it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,' the order remanding it to the State court could have been sustained." This appears to be the only reported case of a removal by the plaintiff as authorized by the Act of 1875, and is distinguishable on that ground, as respects the possibility that plaintiff's claim may have been colorable for the purpose of removing the case.

[19] Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 9. (Per Taft, Lurton and Clark, JJ.)

or forever lose his right to remove.[20] Of course, if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow.[21] But the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement,[22] will not justify remand. And though, as here, the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.[23]

Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached.[24] This is well illustrated by *Kirby* v. *American Soda Fountain Company*, 194 U. S. 141, where in a suit brought by Kirby he alleged that he was induced by the com-

[20] Gordon *v.* Longest, 16 Pet. 97; Kanouse *v.* Martin, 15 How. 198; Chesbrough *v.* Northern Trust Co., 252 U. S. 83, affirming Chesbrough *v.* Woodworth, 251 Fed. 881; Muns *v.* DeNemours, 2 Wash. C. C. 463, Fed. Cas. 9931; Riggs *v.* Clark, 71 Fed. 560; Hayward *v.* Nordberg, *supra;* Johnson *v.* Computing Scale Co., 139 Fed. 339.

[21] North Amer. T. & T. Co. *v.* Morrison, 178 U. S. 262.

[22] Levinski *v.* Middlesex Banking Co., 92 Fed. 449; Tennent-Stribling Shoe Co. *v.* Roper, 94 Fed. 739; Mannheimer *v.* Nederlandsche, 6 F. Supp. 564. *Contra:* James *v.* Western Union Tel. Co., 233 Fed. 301.

[23] Kanouse *v.* Martin, *supra;* Kirby *v.* American Soda Fountain Co., 194 U. S. 141; Wright *v.* Wells, Pet. C. C. 220, Fed. Cas. 18,101; Roberts *v.* Nelson, 8 Blatchf. 74, Fed. Cas. 11,907; Zinkeisen *v.* Hufschmidt, 1 Cent. L. J. 144, Fed. Cas. 18,214; Waite *v.* Phoenix Ins. Co., 62 Fed. 769; Riggs *v.* Clark, *supra;* Hayward *v.* Nordberg Mfg. Co., *supra;* Johnson *v.* Computing Scale Co., *supra;* Coffin *v.* Phila. W. & B. R. Co., 118 Fed. 688; Donovan *v.* Dixieland Amusement Co., 152 Fed. 661; Bernheim *v.* Louisville Property Co., 221 Fed. 273; Jellison *v.* Krell Piano Co., 246 Fed. 509; Twin Hills Gasoline Co. *v.* Bradford Oil Corp., 264 Fed. 440; Kane *v.* Reserve Oil Corp., 52 F. (2d) 972; Travelers Protective Assn. *v.* Smith, 71 F. (2d) 511; Beddings *v.* Great Eastern Stages, Inc., 6 F. Supp. 529. *Contra:* Hughes *v.* Peper Tobacco Whse. Co., 126 Fed. 687. In two tort cases where large damages were claimed, but it appeared at trial that plaintiff's injuries and losses were so slight that a verdict for more than a fraction of the jurisdictional amount could not be sustained the courts remanded. Though not placed upon that ground, their action may have been justified by the conviction that the defendant when it removed knew that the amount involved was too little to give jurisdiction: Turmine *v.* West Jersey, &c. R. Co., 44 F. (2d) 614; American Stores Co. *v.* Gerlach, 55 F. (2d) 658.

[24] The same principle applies in cases where a fixed amount is requisite to jurisdiction on appeal. Lee *v.* Watson, 1 Wall. 337; Cooke *v.* United States, 2 Wall. 218.

pany's false representations to agree to the exchange of his apparatus for one made by the defendant and to pay $2025 in addition. He prayed the cancellation of his obligation to pay the balance of $2025, damages of $2500, and general relief. The cause was removed to the circuit court. The company answered denying Kirby's charges of fraud, relied upon a written agreement alleged to contain all the terms of the contract, asserted full performance on its part, and that he had paid but $325 on his obligation to pay $2025. By cross-complaint, the company demanded $1700 and interest from Kirby and the establishment of a lien on the apparatus delivered to him. Kirby answered that he had voluntarily dismissed the original suit brought by him and that the cross-bill was not within the jurisdiction of the court because it did not claim in excess of $2,000, exclusive of interest and costs. The plea was overruled and judgment rendered on the cross-complaint. In affirming, the court referred to the amount demanded in Kirby's original complaint and said: "The matter in dispute having thus been made to exceed the sum or value of two thousand dollars, exclusive of interest and costs, defendant presented his petition and bond for removal, and the cause was thereupon removed. The jurisdiction thus acquired by the Circuit Court was not divested by plaintiff's subsequent action."

Fifty years earlier in *Kanouse* v. *Martin,* 15 How. 198, the court had held that voluntary reduction of the amount demanded below the sum necessary to give the circuit court jurisdiction could not defeat that jurisdiction once removal proceedings had been perfected. In reliance upon these precedents many cases, cited in Note 23, have been decided.

We think this well established rule is supported by ample reason. If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and

though he would be justly entitled to more, the defendant cannot remove.[25]

This view is further supported by the authorities as to causes in which jurisdiction depends on diversity of citizenship. It uniformly has been held that in a suit properly begun in the federal court the change of citizenship of a party does not oust the jurisdiction.[26] The same rule governs a suit originally brought in a state court and removed to a federal court.[27]

The decisions as to remand of a cause removed because it involves a separable controversy are not inconsistent with those concerning remand for lack of jurisdictional amount. In the case of a separable controversy, if, after removal, the plaintiff discontinues or dismisses as to the defendant who removed, so that there no longer exists any separable controversy, the cause must be remanded.[28] If a cause be removed on this ground the whole case, including the controversy between citizens of the same state, is taken over by the federal court only because one or more of the defendants is entitled to invoke its jurisdiction. The basis of federal jurisdiction failing, it is proper that the remaining parties, who were involuntarily taken into the federal court, should, upon the cessation of the separable controversy which was the cause of their transmission to another tribunal, have their case returned to the state court.

The present case well illustrates the propriety of the rule that subsequent reduction of the amount claimed cannot oust the district court's jurisdiction. Suit was instituted in the State court June 5, 1934. The lump sum claimed was largely in excess of $3,000,

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[25] Woods *v.* Massachusetts Protective Assn., 34 F. (2d) 501. And an amendment in the state court reducing the claim below the jurisdictional amount before removal is perfected is effective to invalidate removal and requires a remand of the cause: Maine *v.* Gilman, 11 Fed. 214; Waite *v.* Phoenix Ins. Co., *supra;* Harley *v.* Firemen's Fund Ins. Co., 245 Fed. 471.

[26] Morgan *v.* Morgan, 2 Wheat. 290, 297; Mollan *v.* Torrance, 9 Wheat. 537; Dunn *v.* Clarke, 8 Pet. 1; Clarke *v.* Mathewson, 12 Pet. 164; Tug River Coal Co. *v.* Brigel, 86 Fed. 818, affirming 73 Fed. 13.

[27] Haracovic *v.* Standard Oil Co., 105 Fed. 785; Lebensberger *v.* Scofield, 139 Fed. 380. Change of parties by substitution or by intervention does not oust the jurisdiction: Phelps *v.* Oaks, 117 U. S. 236; Hardenbergh *v.* Ray, 151 U. S. 112; Wichita R. R. & Light Co. *v.* Pub. Util. Com., 260 U S. 48.

[28] Texas Transportation Co. *v.* Seeligson, 122 U. S. 519; Torrence *v.* Shedd, 144 U. S. 527; Iowa Homestead Co. *v.* Des Moines N. & R. Co., 8 Fed. 97; Bane *v.* Keefer, 66 Fed. 610; Youtsey *v.* Hoffman, 108 Fed. 699; Cassidy *v.* Atlanta etc. Ry. Co., 109 Fed. 673; Sklarsky *v.* Great Atlantic etc. Tea. Co., 47 F. (2d) 662.

exclusive of interest and costs. The items which went to make up the respondent's demand for indemnity were numerous and each, in turn was itself the total of several items of expenditure or liability. There is nothing to indicate that all of the sums for which reimbursement was claimed had actually been expended prior to the beginning of suit or that the sums thereafter to be expended had been ascertained. Not until the second amended complaint was filed in the United States court, in November 1934, did the respondent furnish a statement of the particulars of its claim. That statement is not inconsistent with the making of a claim in good faith for over $3,000 when the suit was instituted. Nor is there evidence that the petitioner when it removed the cause knew, or had reason to believe, that the respondent's claim, whether well or ill founded in law or fact involved less than $3,000. On the face of the pleadings petitioner was entitled to invoke the jurisdiction of the federal court and a reduction of the amount claimed after removal, did not take away that privilege.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity to this opinion.

So ordered.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.